Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NORFOLK SOUTHERN RAILWAY COMPANY
and DANNY STEVE GARNER,
Petitioners,

v.

BRUCE LANG, PEGGY LANG and DOUGLAS K. HAMLIN,
conservator of the estate of Cinda S. Karjala,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Railroad Safety Act, as interpreted by this Court in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), pre-empts state tort claims, including claims of failure to warn about railroad-highway grade crossings, where federal funds have participated in the installation of warning devices at the intersection.

LIST OF PARTIES AND RULE 29.6 LIST

All of the parties to the proceeding are listed in the caption to the petition.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Norfolk Southern Railway Company is a subsidiary of Norfolk Southern Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Alabama entered in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama was entered on July 12, 1996, is reported at —— So. 2d ——, 1996 Ala. Lexis 189, and is included in the Appendix at 1a-24a. The opinions of the Madison County Circuit Court and Calhoun County Circuit Court, each granting summary judgment to petitioner, are not reported and are included in the Appendix at 26a-34a.

JURISDICTION

The order denying petitioners' timely application for rehearing was entered on November 22, 1996. App. 25a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides in Article VI, Clause 2:

> [t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.

Section 205 of the Federal Railroad Safety Act, previously codified at 45 U.S.C. § 434, and currently codified at 49 U.S.C. § 20106, provides in pertinent part:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. . . .

STATEMENT OF THE CASE

Petitioner Norfolk Southern Railway Company is a rail carrier. It operates on tens of thousands of miles of trackage located throughout the eastern United States, including within the State of Alabama. Petitioner Danny Steve Garner, a Norfolk Southern employee, was the locomotive engineer for one of the trains involved in one of the collisions at issue in this case.[1]

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[1] Because petitioner Garner really is only nominally involved in this litigation as it comes to this Court, references hereafter to petitioner refer to Norfolk Southern.

1. History of Grade Crossings and Federal Railroad Safety Legislation and Regulation

a. This case arises out of the danger that exists inherently wherever highways and railroads intersect. In the nineteenth century, roads were built to accommodate pedestrians and horse-drawn traffic. Consequently, they were built right across existing railroad tracks. As the nation quickly developed roads to permit western expansion, constructing crossings at grade was more convenient and less expensive than separating the crossings, *i.e.*, by using a bridge or tunnel. Unfortunately, having highways simply cross the rails poses obvious possibilities for collisions, and those risks increased as highway and rail traffic increased during the latter half of the nineteenth century. With the development and increased use of automobiles, the hazards of grade crossings became acute. Fed. Highway Admin., U.S. Dep't of Transp., *Rail-Highway Crossings Study*, at 1-4 to 1-5 (Apr. 1989) ("DOT Study").

Grade crossings are particularly hazardous because, unlike a car, a train traveling at normal speed cannot ordinarily be stopped within the distance allowed after the operator of the train sees an obstruction on the tracks. Nor can a train simply swerve to avoid a collision. Moreover, use of emergency brakes threatens harm to crew and passengers because of the substantial risk of derailment. See DOT Study 5-10. Thus, as long as roads cross rails at grade, there will be a significant potential for collisions with tragic consequences.

What makes the problem of eliminating grade crossing accidents even more difficult is the overlap of private and public responsibility for vehicular use of and safety at these crossings. For example, railroads are responsible for train operations. Railroads also cooperate with state and federal highway officials by providing information about railroad activities, such as the number of trains per day, train speeds, and similar information. State and federal officials then use this information in determining what

traffic control devices should be installed at a particular crossing. State highway officials regulate the roads and have access to information about current and future vehicular traffic on those thoroughfares, and can assimilate and evaluate information from all the railroads that operate in the state in order to determine priorities for various crossing projects. The Federal Highway Administration is responsible for reviewing and approving federal aid projects for the improvement of rail-highway grade crossings. Thus, the decision how most effectively to improve safety at any given crossing requires a comprehensive approach.

b. In the 1940s, Congress enacted legislation aimed at promoting safety at grade crossings. Recognizing that the primary answer to the safety problem lay in controlling traffic moving onto the tracks, Congress initially addressed the grade-crossing issue through federal highway legislation. See DOT Study at 1-7; Federal-Aid Highway Act of 1944, ch. 626, 58 Stat. 838 (codified as amended at 23 U.S.C. § 130(a)) (federal funds to states "for the elimination of hazards of railway-highway crossings").[2]

Despite "continuing efforts to improve" safety, accidents at grade crossings "increased rather sharply" between 1960 and 1967. DOT Study 1-5. A Task Force on Railroad Safety was created by the Secretary of Transportation in 1969. The Task Force concluded that a "comprehensive national approach," was called for and recommended that the Secretary be given the "authority to promulgate reasonable and necessary rules and regulations establishing safety standards in all areas of railroad safety." Report of the Task Force on Railroad Safety

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[2] Some years before Congress responded to the issue by using federal highway funds, this Court recognized that "[t]he railroad has ceased to be the prime instrument of danger and the main cause of [grade-crossing] accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 422-23 (1935).

("Task Force Report"), included as Appendix F to H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4127, 4129.

Congress responded by enacting the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421 *et seq.*[3] Consistent with the Task Force's argument in favor of a uniform, national response to this problem, Congress provided that all state law addressing a particular aspect of rail safety would be pre-empted once the Secretary adopts a rule or standard to cover that subject matter. Employing strong pre-emptive language, Congress declared:

> laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. . . .

Id. § 434. Congress thus made clear that once the Secretary has adopted safety requirements that "cover" a particular "subject matter," then the states are divested of authority to impose any additional requirements, whether by statutory or common law. See *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993).

Three years later Congress passed the Highway Safety Act of 1973, 87 Stat. 282 (codified as amended at 23 U.S.C. § 130), which established the Rail-Highway Crossing Program. This program provides federal funds to improve safety at crossings. To participate in this program,

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[3] The provisions of FRSA in Title 45 were repealed and reenacted in Title 49 on July 5, 1994. *See* Revision of Title 49, Transportation United States Code, Pub. L. No. 103-272, § 1(e), 1994 U.S.C.C.A.N. (108 Stat.) 745, 863. The Supreme Court of Alabama's opinion analyzes the superseded provision. To avoid confusion, petitioner also will refer to the relevant provision as 45 U.S.C. § 434.

each *state* must develop a plan systematically to identify dangerous railroad grade crossings and to make each one safe over time. 23 U.S.C. § 130(d); see also 23 C.F.R. §§ 924.9, 1205.4.

c. The regulations implementing the Rail-Highway Crossings Program guide the "planning, implementation and evaluation of [highway] safety programs and projects." 23 C.F.R. § 924.7. States are required to maintain data concerning accident and traffic volumes to assist in deciding which crossings require more immediate attention. *Id.* §§ 924.13, 924.15.

More specifically, the Secretary has adopted regulations concerning the selection of warning devices to be installed with federal funds at each grade crossing. *Id.* § 646.214 (b). Thus, at some crossings the regulations mandate "automatic gates with flashing light signals." *Id.* § 646.214 (b)(3)(i). Where automatic gates are not required, however, there remains a significant role for the Secretary in deciding what safety measures should be installed at each crossing. Thus, regardless of "whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad," the ultimate choice of safety measures, which the federal government funds, "is subject to the approval of FHWA." *Id.* § 646.214 (b)(4). See generally *Easterwood,* 507 U.S. at 662-63.

2. Proceedings and Decisions Below

a. This case involves two separate motor vehicle accidents involving collisions with petitioner's trains at grade crossings. The two accidents involve similar circumstances, which is why the Supreme Court of Alabama consolidated them. Respondents in both cases are representatives of the individuals actually involved in the accident. Respondent Hamlin is the conservator of the estate of Cinda S. Karjala, who is incapacitated, and the Lang respondents are the parents of David Alan Lang, who is deceased.

The accident in the *Hamlin* case occurred at approximately 4:00 a.m. on November 23, 1991, when Ms. Karjala drove her automobile into the side of the 106th car of petitioner's train as it was crossing Brock Road in Madison County, Alabama. The crossing was marked with advance warning signs, pavement markings and a stop sign and crossbucks. An eyewitness indicated that the night was dark and that there was patchy fog, but that the advance warning signs for the crossing and the stop sign and crossbucks were clearly visible and reflected brightly in his car's headlights. Ms. Karjala's vehicle never slowed down at the intersection and collided directly into the train causing her severe and permanent injuries.[4]

b. In both cases it was undisputed that "warning devices" at the grade crossings had been installed with federal funds pursuant to 23 C.F.R. § 646.214(b)(3)(i). App. 27a (evidence "undisputed" that "Brock Road crossing at issue in this case . . . utilized federal funds for the improvement of that crossing including the installation of warning devices"); *id.* at 32a ("undisputed facts" concerning "federal funds"). Under the regulatory scheme outlined above, this meant that a judgment was made that automatic gates with flashing lights were not warranted under 23 C.F.R. § 646.214(b)(3)(i), which lists six "conditions" for which active warning devices are required. Accordingly, the decision concerning the precise warnings that were funded at the two grade crossings were

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[4] In the *Lang* case the facts were similar. The accident occurred on February 21, 1988, at about 6:00 p.m. at the Pace Street crossing in Oxford, Alabama. The weather was clear and dry. There were two standard double-faced crossbuck signs, one on each side of the track, and a stop sign at the crossing. The Lang automobile pulled up behind another car that was stopped at the crossing waiting for the oncoming train to pass. Lang's car pulled around the parked vehicle and pulled onto the tracks where the train collided with it.

"subject to the approval of FHWA."[5] See generally *Easterwood*, 507 U.S. at 670-71.

c. Respondent Hamlin filed suit in the Circuit Court of Madison County, Alabama, alleging petitioner's negligence and/or wantonness in the maintenance of the railroad crossing where Karjala drove her vehicle into the side of a train. App. 26a. Relying upon the use of federal funding in the installation of warning devices at the crossing, the circuit court held that respondent Hamlin's claims were pre-empted under *Easterwood*. *Id.* at 27a.[6]

The Supreme Court of Alabama consolidated the two cases for appeal and a divided court reversed. App. 1a-24a. The majority described the *Hamlin* case as follows: "there was a dense fog in the area and [petitioner] knew that this area was subject to fog that blocked the passive warning signs." *Id.* at 3a. The court then analyzed both the regulatory scheme and this Court's decision in *Easterwood* at length and concluded that, even though federal funds were used at the crossing in question, the pre-emptive scope of FRSA did not extend to

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[5] The Secretary has delegated his authority to administer this program to the Administrator of the Federal Highway Administration.

[6] The Lang respondents filed their lawsuit in the Circuit Court of Calhoun County, Alabama, making allegations virtually identical to those in the *Hamlin* proceeding. The circuit court held that petitioner "is entitled to a judgment as a matter of law on the plaintiffs' claims seeking to impose liability on the railroad for inadequate warning devices at the crossing." App. 32a. In so holding the court explained that its "decision is based on the preemption of such claims on the reasoning set out," *inter alia*, in *Easterwood*. *Id.* at 33a.

In both cases respondents had raised claims in addition to the adequacy of the signalization, but all of those claims were either expressly abandoned at the trial level or were dismissed and not appealed. Thus, the only tort claims that survived the trial court proceedings on appeal involved the adequacy of the traffic control devices at the two grade crossings.

the "failure to warn" claim that was the basis of the *Hamlin* lawsuit.[7]

Justice Maddox dissented. He interpreted this Court's decision in *Easterwood* as holding "that when federal funds are used in the installation of warning devices at a railroad highway crossing, and where, as here, there was federal participation in the installation of warning devices, then a cause of action that is based on an alleged inadequate or defective safety practice is pre-empted." App. 20a. Quoting this Court's opinion in *Easterwood* concerning the scope of its pre-emption ruling, Justice Maddox argued that once federal funds participate in the installation of warning devices at a crossing, then any effort "to impose an independent duty on a railroad to identify and/or repair dangerous crossings" is pre-empted. *Id.* at 22a (quoting *Easterwood*, 507 U.S. at 671). Based on this ruling the dissent concluded that respondents' claims were pre-empted.[8]

REASONS FOR GRANTING THE PETITION

This Court four years ago began the process of determining under 45 U.S.C. § 434 the pre-emptive effect of federal safety regulations on state tort duties imposed upon railroads arising out of grade crossing accidents. In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658,

[7] The court below similarly held that the federal funding involved in providing signals at the crossing involved in the *Lang* case did not pre-empt the claim that the railroad "failed to maintain" the traffic control devices adequately. App. 10a. The majority found support in the Eleventh Circuit's decision in *Michael* v. *Norfolk Southern Ry.*, 74 F.3d 271 (11th Cir. 1996), where the court held that *Easterwood* did not pre-empt state law claims based on the railroad's failure to comply with federal requirements in installing a crossing bar with federal funds. App. 10a.

[8] The dissent distinguished *Michael* on the ground that there was no claim that petitioner had failed to comply with any federal regulations with respect to the traffic control devices at the two grade crossings where the accidents occurred. App. 24a.

671 (1993), the Court adopted the approach proposed by the United States, and held that "for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed." Accordingly, in that situation federal regulations "cover the subject matter of state law which . . . seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." *Id.* Thus, under *Easterwood,* participation of federal funds in a grade crossing project are the *sine qua non* of pre-emption.

In this case the Alabama Supreme Court declined to hold state court claims pre-empted where one plaintiff sought to impose a duty to "warn" about a hazard and the other asserted a continuing duty to "maintain" the traffic control devices at a federally-funded crossing. Neither holding can be reconciled with the opinion in *Easterwood* and both are in conflict with decisions of federal courts of appeals. Those courts, applying *Easterwood,* have recognized that, once federal monies are used to install a safety device at a grade crossing, then the responsibility for the adequacy of signals at that grade crossing shifts away from the railroad and cannot be reimposed upon it by state tort law. Under those decisions, petitioner would not be liable in state tort law for accidents occurring at the railroad caused by inadequate warning devices arising out of either a failure to warn or to repair.

This case is the natural sequel to *Easterwood.* The Court should grant the petition both to resolve the decisional conflict among the lower courts and to provide needed clarity as to how *Easterwood* applies. Accordingly, further review of the decision below is warranted.

1. The question of what tort duties states can impose upon railroads to promote safety at grade crossings is a recurring issue that this Court first addressed in *Easterwood.* In that case a driver was killed at a grade crossing that lacked an automatic gate. The plaintiff's com-

plaint alleged that the railroad had been negligent in not providing a gate at that intersection. The railroad had argued that the federal regulatory scheme concerning grade crossings "covered the subject matter" and thus under 45 U.S.C. § 434, pre-empted state tort claims based on inadequate safety precautions at that grade crossing.

As in this case, the trial court granted the railroad summary judgment, which was reversed on appeal. This Court granted the petition and held on the particular facts of that case that there was no pre-emption. The Court rejected a number of pre-emption theories offered by the railroad, but ultimately adopted the interpretation of § 434 proposed by the United States, which based pre-emption on federal funding of warning devices at a particular grade crossing.

The Court reasoned that "under §§ 646.214(b)(3) and (4), a project for the improvement of a grade crossing must either include an automatic gate or receive FHWA approval if federal funds 'participate in the installation of [warning] devices.'" *Easterwood*, 507 U.S. at 670. Because the regulations clearly envision a direct and authoritative role for the Secretary or his delegate whenever federal funds are used to install any form of warning device, active or passive,[9] the regulations "cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." *Id.* at 671. In sum, the Court identified federal funding of the grade crossing warning devices as the *sine qua non* of pre-emption.

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[9] Although the Court dealt specifically with a case involving a gate crossing arm, which is an active warning device, the Court's analysis of the regulatory scheme makes plain that the rule applies equally to "passive warning devices," such as those involved in this case. *See Easterwood*, 507 U.S. at 672 n.11 (quoting the relevant definitions of passive and active warning devices).

In this case there was no dispute that federal funds were used to install warning devices at the two grade crossings involved in these accidents. The effect of that funding based on the plain language of the Court's analysis is that all state law duties "to identify and/or repair dangerous crossings" are pre-empted. This clearly requires reversal of the decision below holding that a state tort law "duty to warn" of foggy conditions at a crossing survives the federal government's approval and funding of specific warning devices at that site.

Similarly, this Court's explicit reference to pre-emption of a duty to "repair" is facially inconsistent with the ruling below that the railroad has a duty to maintain the devices installed at government expense and with the federal government's approval. There is no claim, as there was in *Michael*, that the railroad violated any federal requirements in the installation of the warning devices at either of the crossings and thus under *Easterwood* the railroad is no longer subject to state tort law concerning the adequacy of the signalization devices at those crossings.

2. The holding of the Alabama Supreme Court that a tort duty to warn survives federal funding and approval of a grade crossing's protections because of foggy conditions is directly contrary to the holdings of three federal courts of appeals. In *Elrod* v. *Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1995), and in *Hester* v. *CSX Transportation, Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996), both courts of appeals held that once the railroad proves that federal funding was used at the grade crossing and that the safety devices were "operating," then all claims that the signals were inadequate are pre-empted.

In *Elrod* the court of appeals dealt with passive warning devices similar to those involved here, and the court held that federal funding of those devices meant that "sta'e-law negligence claims based on the alleged inade-

quacy of the warning devices . . . is pre-empted." 68 F.3d at 244. Thus, no matter how the claim is styled—failure to warn or failure to repair or maintain—is irrelevant. The responsibility for grade crossings devolves to the federal government once its funds are used because it has approved the warning devices as adequate. Plainly, the holding below that an inadequate signalization claim dressed up in "failure to warn" or "failure to maintain" garb would not survive the broad holding of the Eighth Circuit in *Elrod*.

Similarly, in *Hester* the court of appeals concluded broadly that where federal funds were used to upgrade passive warnings at a crossing, "state law claims based on inadequate signalization at the crossing are therefore pre-empted." 61 F.3d at 387. Again, the court of appeals made no effort to parse out different tort claims; instead, the court categorically found all tort claims based on inadequate signalization to be barred. Thus, the express holding below that the fog made the signals in the *Hamlin* case inadequate cannot be reconciled with the decision in *Hester*.

The holding below is even more directly rejected by the Tenth Circuit's holding in *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996), where the court of appeals dismissed a state tort claim based on a "failure to warn" of the inadequacy of the safety precautions that had been federally funded and approved. *Id.* at 1189. The court rejected the plaintiff's argument that the court should look beyond the date the federal government funded and approved the passive warning devices and determine whether circumstances had changed that would justify "suspend[ing]" pre-emption. *Id.* at 1192. Instead, the court held that federal funding meant that "*the final authority to decide* what warning system is needed has been taken out of the railroad's and the state's hands" and therefore the plaintiff's failure to warn claim was pre-empted. *Id.*

In contrast to the decisions of the federal courts of appeals, which consistently interpret the federal funding and approval of a warning device at a particular crossing broadly to pre-empt state tort duties, the Alabama Supreme Court cut back savagely on the pre-emptive sweep of § 434 as implemented by 23 C.F.R. § 646.214(b). This Court's decision in *Easterwood* on its face supports the broader interpretation adopted by the federal courts of appeals. Indeed, the logic of the Alabama Supreme Court effectively vitiates the pre-emptive effect of the Secretary's approval of particular devices by permitting plaintiffs to label their claims as failures to warn or maintain rather than failures to provide adequate signals. It cannot be that pre-emption turns solely on plaintiff's choice of labels. At a minimum, the Court should grant the petition to clarify the meaning of *Easterwood* and decide whether the federal courts or the Alabama Supreme Court has been more faithful to the lesson of this Court's decision.

* * * *

The Court's decision in *Easterwood* has generated more than a dozen different federal court of appeals decisions attempting to apply the unique pre-emption rule adopted by this Court. See App. 20a n.6 (Maddox, J., dissenting) (collecting cases). In part, this is a function of the sad reality that there are thousands of grade crossings and hundreds of accidents at those crossings per year.[10] That many accidents assures a significant number of law-

[10] As of 1990, there were 176,572 public grade crossings. Fed. R.R. Admin. Office of Safety, U.S. Dep't of Transp., *Rail-Highway Crossing Accident/Incident and Inventory Bulletin No. 13—Calendar Year 1990*, at 45 (July 1991). Most of these public crossings are protected by safety markings similar to those at the crossings involved in this case. Although the federal government's integrated approach to improving grade crossing safety has been generally effective, there are still more than 2000 collisions per year and more than 500 fatalities each year. *Id.* at 6.

suits annually. Each lawsuit necessarily raises a question concerning the adequacy of the warning devices at the particular grade crossing. Because federal funds have been expended at a vast number of crossings, the meaning of this Court's decision in *Easterwood* is a recurring and dominant issue in virtually all grade-crossing litigation.

The Court in *Easterwood* did not adopt a self-executing rule of law. The questions of when precisely pre-emption attaches to the commitment or use of federal money,[11] and whether the federal "approval" of a project has to be express or should be implied from the provision of funds [12] are issues that have divided courts of appeals. These issues in time probably will require resolution by this Court as it refines the precise contours of *Easterwood*. The issue presented by the holding below is, however, a more direct frontal assault on *Easterwood* and therefore involves a more fundamental issue warranting this Court's immediate attention.

Here the Supreme Court of Alabama has concluded that *Easterwood* is largely limited to semantics. It pre-empts claims of negligence under state law based on blatant allegations that the signals were not adequate, but, in the majority's view, *Easterwood* does not apply to other state law claims, such as failure to warn or maintain, even though substantively those claims are no more than an assertion of inadequate signalization. If *Easterwood* is to be reduced to a mere pleading rule, then that determination ought to be made by this Court. Federal courts of appeals have refused to strip *Easterwood* of its

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[11] *Compare St. Louis Southwestern* v. *Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994) (pre-emption arises when device is installed and operating), *cert. denied*, 115 S. Ct. 1963 (1995) *with Hatfield* v. *Burlington N.R.R.*, 64 F.3d 559 (10th Cir. 1995) (pre-emption when FHWA commits to project and funds studies).

[12] *Compare Shots* v. *CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994) (specific approval required on facts of that case) *with Armijo* v. *Atchison, T. & S. Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996) (approval presumed from statutory scheme).

natural meaning and the stark contrast between their approach and the holding below creates precisely the kind of unseemly division between state and federal decisions on a subject of national importance warranting a uniform rule that requires this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 20, 1997

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APPENDICES

APPENDICES

APPENDIX A

[Released Jul. 12, 1996]

SUPREME COURT OF ALABAMA
SPECIAL TERM, 1996

1931221

DOUGLAS K. HAMLIN, as conservator of the estate of CINDA S. KARJALA, an incapacitated person

v.

NORFOLK SOUTHERN RAILWAY COMPANY and DANNY STEVE GARNER

1931292

BRUCE LANG and PEGGY LANG

v.

SOUTHERN RAILWAY, *et al.*

Appeals from Madison Circuit Court (CV-91-2523) and Calhoun Circuit Court (CV-90-786)

KENNEDY, JUSTICE.

The plaintiffs in these two cases appeal from summary judgments for the defendant, Norfolk Southern Railway Company.

A summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c)(3), A.R.Civ.P. In order to defeat a properly supported motion for summary judgment, the nonmovant must present substantial evidence creating a genuine issue of material fact. § 12-21-12, Ala.Code 1975. "Substantial evidence" means "evidence of such weight and quality that fairminded persons in exercise of impartial judgment can reasonably infer existence of the fact sought to be proved." *West v. Founders Life Assurance Co.*, 547 So.2d 870, 871 (Ala. 1989).

These cases arose following automobile-train collisions at two separate railroad crossings. At one of those crossings, David Alan Lang was killed, and at the other crossing Cinda S. Karjala suffered permanent brain damage and paralysis.

It is undisputed that neither crossing had "active" warning devices, such as flashing lights, bells, or gates.[1] However, both crossings did have "passive" warning devices, such as a "crossbuck"[2] and a stop sign.[3] Additionally,

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[1] "Active warning devices" are defined by 23 C.F.R. § 646.204(j) (1992), as "those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists positive warning of the approach or presence of a train."

[2] A "crossbuck" sign is two narrow white overlapping boards in the shape of an "X." The words "RAILROAD" and "CROSSING" are written across the overlapping boards in black paint.

[3] "Passive warning devices" are defined under 23 C.F.R. § 646.204 (i) as "those traffic control devices, including signs,

there was evidence in the Lang case that some of the painted warning signs were faded from view, that vegetation had blocked some of the warnings, and that some of the passive warning signs were missing. The evidence concerning the accident involved in the Hamlin case was that there was a dense fog in the area and that Norfolk Southern knew that this area was subject to fog that blocked the passive warning signs.

Both sets of plaintiffs sued Norfolk Southern, alleging, among other things, that it had negligently and/or wantonly failed to provide and maintain adequate warning signals at either of the respective railroad crossings. Norfolk Southern successfully moved for summary judgment as to these claims, arguing that they were preempted by federal law. The plaintiffs appeal, arguing that the preemption doctrine does not apply to bar adjudication of the state tort law claims.

The United States Supreme Court in *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658 (1993), examined a case similar to these two cases. *Easterwood* arose out of an automobile-train collision at a railroad crossing, and it involved a state tort law claim based on an alleged failure to provide adequate warning signals. Thomas Easterwood was killed when a CSX train collided with his truck. His widow contended "that CSX was negligent under Georgia law for failing to maintain adequate warning devices at the crossing." 507 U.S. at 661. At the crossing where Easterwood was killed, there were dual flashing lights, crossbucks, advance yellow warning post signs, and pavement markings. Easterwood's widow claimed that CSX had negligently failed to install gate arms and that the flashing lights were positioned in such a manner that the lights were obscured by sunlight. See

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markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train."

Easterwood v. CSX Transportation, Inc., 933 F.2d 1548 (11th Cir. 1991).

The trial court entered a summary judgment for CSX; the Eleventh Circuit Court of Appeals affirmed in part and reversed in part. The Supreme Court granted certiorari review to address the preemptive effect of the Federal Railroad Safety Act ("FRSA") on negligence claims against railroads.

The purpose of FRSA is "to promote safety in all areas of railroad operations and to reduce railroad-related accidents." 45 U.S.C. § 421. FRSA mandates that the Secretary of Transportation study safety problems posed by railroad crossings and develop solutions for those problems. 45 U.S.C. § 431. The Secretary of Transportation is also empowered to prescribe "appropriate rules, regulations, orders, and standards for all areas of railroad safety." § 431(a). Section 434 of Title 45, part of FRSA, contains saving and pre-emption clauses; it reads as follows:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce."

Where a state statute conflicts with or frustrates federal law, the [state statute] must give way" to the federal law.

Easterwood, 507 U.S. at 663. "In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is 'the clear and manifest purpose of Congress.'" *Easterwood,* 507 U.S. at 663-64, quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Following a report by the Secretary of Transportation concerning crossing grades, Congress responded by enacting the Highway Safety Act. The Act provides that States are entitled to federal funds to improve grade crossings. In return, the States are to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." *Easterwood,* 507 U.S. at 663, quoting 23 U.S.C. § 130(d). The Federal Highway Administration ("FHWA") promulgated regulations to improve grade crossings under the FRSA and the Highway Safety Act.

The issue in *Easterwood* was whether the Secretary of Transportation had issued regulations covering the same subject matter as Georgia negligence law pertaining to the maintenance of grade crossings and the operation of trains at grade crossings. The Supreme Court held that the federal regulations adopted by the Secretary of Transportation preempted Easterwood's negligence action only insofar as it asserted that CSX's train was traveling at an excessive speed.

The Supreme Court discussed other federal regulations relevant to Easterwood's claim. Under 23 C.F.R. pt. 924 (1992), States receiving federal aid must establish a highway safety program identifying all types of highway hazards and guiding the State in implementing and evaluating remedial measures. In setting priorities, the States

are to rank the dangers posed by grade crossings. § 924.9 (a)(4). After developing a program, a State must evaluate the effectiveness and costs, § 924.13, and file yearly reports with the FHWA. § 924.15.

The Supreme Court stated that itw as not prepared to find preemption on the basis of 23 C.F.R. pt. 924. Specifically, the Court stated:

> "These provisions establish the general terms of the bargain between the Federal and State Governments: The States may obtain federal funds if they take certain steps to ensure that the funds are efficiently spent. On its face, this federal effort to encourage the States to rationalize their decisionmaking has little to say about the subject matter of negligence law, because, with respect to grade cros...g safety, the responsibilities of railroads and the State are, and traditionally have been, quite distinct. Before the enactment of FRSA, for example, Georgia's authority over grade crossing improvements did not excuse a railroad's liability in negligence for failing to maintain a safe crossing, see n.5, supra, just as a jury finding of railroad negligence bore no particular significance on the State's safety efforts beyond that which the State wished to give it. . . . In light of the relatively stringent standard set by the language of § 434 [regarding pre-emption] and the presumption against pre-emption, and given that the regulations provide no affirmative indication of their effect on negligence law, we are not prepared to find pre-emption solely on the strength of the general mandates of 23 CFR pt. 924."

Easterwood, 507 U.S. at 667-68.

Because these two appeals are concerned with whether federal statutes concerning the use of particular warning devices preempt state law, the portion of the *Easterwood*

opinion discussing those specific statutes is the basis for our holding. The Supreme Court noted that states receiving federal funds must employ devices that conform to standards set out in the FHWA's *Manual on Uniform Traffic Control Devices for Streets and Highways* ("MUTCD"). 23 C.F.R. §§ 646.214(b), 655.603 (1992).

> "In addition, for projects which involve grade crossings 'located with the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of [an] existing roadway,' see § 646.214(b)(2), or in which 'Federal-aid funds participate in the installation of the [warning] devices,' regulations specify warning devices that must be installed. See §§ 646.214(b)(3) and (4)."

Easterwood, 507 S.Ct. at 666.

Under § 646.214(b)(3), states must employ automatic gates with flashing light signals as part of any improvement project that concerns a crossing that features one or more of the following features: 1) multiple main line tracks; 2) multiple tracks at or near the crossing that may be occupied by a train so as to obscure the movement of an approaching train; 3) high speed trains operating in areas of limited visibility; 4) high speed trains combined with a moderately high volume of traffic; 5) either a high volume of traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distances, continuing accident occurrences, or any combination of these; or 6) where a diagnostic team made up of representatives of the parties of interest in the crossing recommends them.

When railroad crossings do not present any of the conditions set out in § 646.214(b)(3), then "the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway

agency, and/or the railroad, is subject to the approval of FHWA." § 646.214(b)(4).

The *Easterwood* Court held that the mandate that the States comply with the MUTCD does not cover the subject matter of the tort law of grade crossings. In *Easterwood*, CSX argued that 23 C.F.R. § 646.214(b)(1), along with Part VIII of the *Traffic Control Systems for Railroad-Highway Grade Crossings Manual* combined to create a situation where state law was preempted by federal law. The Court found this argument to be implausible. 507 U.S. at 669.

The Supreme Court next looked to §§ 646.214(b)(3) and (4), which, unlike the foregoing provisions, did establish requirements for the installation of particular warning devices. The *Easterwood* Court held that "[e]xamination of these regulations demonstrates that, when they are applicable, state tort law is preempted. However [CSX] has failed to establish that the regulations apply to [this case], and hence we find [Easterwood]'s grade crossing claim is not pre-empted." 507 U.S. at 670.

> "[U]nder §§ 646.214(b)(3) and (4), a project for the improvement of a grade crossing must either include an automatic gate or receive FHWA approval if federal funds 'participate in the installation of the [warning] devices.' Thus, unlike the Manual, § 646.214(b)(3) and (4) displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. Indeed, §§ 646.214(b)(3) and (4) effectively set the terms under which railroads are to participate in the improvement of crossings. The former section envisions railroad involvement in the selection of warning devices through their participation in diagnostic teams which may recommend the use or nonuse of crossing gates. §§ 646.214(b)(3)(i)(F)

> and (3)(ii). Likewise, § 646.214(b)(4), which covers federally funded installations at crossings that do not feature multiple tracks, heavy traffic, or the like, explicitly notes that railroad participation in the initial determination of 'the type of warning device to be installed' at particular crossings is subject to the Secretary's approval. In either case, the Secretary has determined that the railroads shall not be made to pay any portion of installation costs. § 646.210(b)(1) (1992). *In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which* [*Easterwood*] *relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.*"

507 U.S. at 670-71 (emphasis added).

Where a state law conflicts with or frustrates a federal law, the state law must give way. U.S. Const., Art. VI, cl. 2; *Easterwood*, 507 U.S. at 663; *Maryland v. Louisiana*, 451 U.S. 725 (1981). "In the interest of avoiding unintended encroachment on the authority of the States, however, *a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.* Thus, pre-emption will not lie unless it is *'the clear and manifest purpose of Congress.'*" *Easterwood*, 507 U.S. at 663-64 (emphasis added).

In *Michael v. Norfolk Southern Ry.*, 74 F.3d 271 (11th Cir. 1996), a Norfolk Southern train collided with an automobile, killing both occupants. The evidence presented in favor of the plaintiffs (representatives of the driver and passenger) was that the car was travelling only

5 to 10 miles per hour, that it was extremely foggy, that the active warning signals had malfunctioned, and that the crossing bar did not comply with federal regulations. The trial court entered a summary judgment in favor of Norfolk Southern, holding that the state law claims of negligence were preempted by federal law. The Eleventh Circuit reversed.

Regarding the claims of negligent maintenance and failure to warn the public of the defective nature of the crossing, the Eleventh Circuit held that the state claims were not preempted by 23 C.F.R. § 646.214(b)(3) or (4). The court noted that those regulations deal with the design and installation of new warning devices and not the maintenance of those devices, or the failure to warn the public of defective devices. The court held that these federal regulations were not applicable to the negligent maintenance claim or the failure-to-warn claim, based on *Easterwood*.

Looking at the evidence submitted in support of the defendant's motion for summary judgment and viewing that evidence in a light most favorable to the plaintiffs, as we are required to do, we hold, in accordance with the Eleventh Circuit's rationale in *Michael*, that the plaintiffs' claims are not preempted by federal law. Therefore, we reverse and remand.

REVERSED AND REMANDED.

Hooper, C. J., and Almon, Shores, Ingram, and Butts, JJ., concur.

Maddox and Houston, JJ., dissent.

MADDOX, JUSTICE (dissenting).

The ultimate question presented for review here is whether the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. §§ 421-447, preempts these two tort claims, which arise out of accidents at two railroad crossings at which the plaintiffs claim the warning devices were inadequate or defective.[4]

The majority holds that the preemption doctrine does not apply. Although the doctrine of federal preemption, especially of a state tort claim, is sometimes confusing and difficult to understand, I have concluded, after carefully reviewing the law of federal preemption, especially as it relates to the adequacy of warning signs or devices when the evidence shows that federal funds were used to improve safety at a particular railroad crossing, as in these cases, that the doctrine applies in these two cases and that the trial judges correctly entered a summary judgment for the defendants in each case. Consequently, I must respectfully dissent.

These cases arise out of two motor vehicle-train collisions that occurred at separate train crossings. Although the legal issue is the same in both cases, I will address the facts of each case separately.

The Hamlin Case

The injured motorist, Cinda S. Karjala, was traveling on Brock Road in Madison County, at 4:00 a.m. in the morning in a patchy fog and attempting to cross a railroad intersection when her car collided with a Norfolk Southern Railway train. The plaintiff, as conservator of of the estate of Ms. Karjala, who is now incapacitated, brought this action against Norfolk Southern Railway Company and its engineer, Danny Steve Garner.

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[4] These cases involved two separate railroad crossings, but the legal issue presented is the same in both cases; therefore they have been consolidated for the purpose of writing one opinion.

The defendants filed a motion for summary judgment and in support of their motion they presented an affidavit of a witness who had been following Ms. Karjala. The witness stated, "I was watching Ms. Karjala, to see if she slowed, but her brake lights never came on and I was not able to tell that she slowed at all." (C.R. 143.) The crossing was marked with advance warning signs, pavement markings, a stop sign, and crossbucks. The defendants also filed another affidavit, executed by Dykes T. Rushing, who was employed by the Alabama State Department of Transportation as an office engineer; he stated that federal funds were used in the installation of the warning signs and pavement markings at the Brock Road Crossing.[5]

The defendants moved for a summary judgment, based on the holding of the United States Supreme Court in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993). The trial court entered a summary judgment with the following order:

> "This matter is presented to the Court on various motions including the defendants' motion for summary judgment. Because this court is of the opinion that the plaintiff's claims against the defendants for negligence and wantonness are preempted by the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. §§ 421-447 (1988 and Supp. II 1990), it is necessary only to address the defendants' motion for summary judgment based on the claim of preemption.
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> "In this case, the plaintiff [Douglas K. Hamlin] seeks to recover from the defendants damages for personal injuries which [the plaintiff] claims resulted from the defendants' negligence and/or wantonness

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[5] The project as a part of which these warning devices were installed included the pavement markings, reflective yellow advance warning signs, and circular signs displaying a cross with the letters "RR" in black, and Rushing stated that "[t]he design and installation of these signs and pavement markings were approved and authorized by the Federal Highway Administration and federal funds were expended for the design and placement of these signs and pavement markings." (C.R. 128.)

in the maintenance of a railroad crossing located on Brock Road in Madison County, Alabama. On the occasion of the accident made the basis of this suit, [Ms. Karjala] drove her motor vehicle into the 106th train car of the defendants' train. The accident occurred at night and in patchy fog.

"The plaintiff's claims are based on allegations that the crossing was ultrahazardous; that the defendants failed to provide and maintain adequate warning devices at the crossing; and, that the defendants were negligent and/or wanton in failing to have illumination devices on the side of its train cars.

"In support of its motion for summary judgment, the defendants have presented the affidavit of Dykes T. Rushing, Office Engineer for the Alabama Department of Transportation, who is responsible for the oversight of the Alabama State Department of Transportation Records of Federal Aid Projects. He is also the custodian of those records. He testified that the Brock Road crossing at issue in this case involved participation by the Federal Highway Administration and utilized federal funds for the improvement of that crossing including the installation of warning devices. This evidence is not disputed.

"Based on these undisputed facts, this Court concludes that there is no genuine issue of material fact and [that] the defendants are entitled to a judgment as a matter of law on the plaintiff's claims of failure to provide and maintain adequate warning devices at the crossing. This decision is based on the preemption of such claims as set out in *Borden v. CSX Transportation, Inc.*, 843 F. Supp. 1410 (M.D. Ala. 1993), and *CSX Transportation, Inc. v. Easterwood*, [507 U.S. at 668,] 113 S.Ct. at 1740-41.

"With regard to the plaintiff's claims that the [defendant railway] failed to have illumination devices on its train cars, this Court finds that there is

no federal or state duty to provide such illumination devices. The Federal Railway Safety Act regulations occupy the field of warning devices and railroad safety so as to preempt any state law requirements for such illumination devices. Accordingly, the Court finds that summary judgment is due to be granted in favor of the defendants as to that claim.

"It is therefore ORDERED, ADJUDGED AND DECREED by the Court that summary judgment be and the same is hereby entered in favor of the defendants on the claims of the plaintiff . . . . Costs are taxed to the plaintiff."

(C.R. 444-46.)

The Lang case

The accident involved in the Lang case occurred in Oxford, Alabama, at approximately 6:00 p.m. at the intersection of Pace Street and Norfolk Southern's main line track. There were two double-faced crossbuck signs, one on each side of the track, and a red and white octagonal "STOP" sign on the south side of the track. The driver, David Alan Lang, pulled in behind another car that was stopped at the track, waiting for the train involved in this accident to pass. Mr. Lang pulled around the car that was stopped at the crossing and had proceeded across the tracks when the collision occurred; he died as a result of this collision.

As with the crossing in the Hamlin case, federal funds were also used in the installation of advance warning signs on both sides of the crossing involved in the Lang case, and no-passing zone signs were placed on both sides of the crossing, and "R X R" pavement markings were painted on both sides of the crossing. (C.R. 557-602.) Dykes T. Rushing, who had prepared an affidavit for filing in the Hamlin case, also made an affidavit in the Lang case. In his affidavit he stated that he was employed by the Alabama State Department of Transportation as an office engineer, that the Federal Highway Administra-

tion had approved and authorized the project to install passive warning devices at this particular crossing, and that federal funds were used in the project. As in the Hamlin case, the trial court entered a written order granting the defendant's motion for summary judgment:

> "The matters addressed by this Order have been the subject of several hearings as well as two trial settings in the last three weeks. The defendants, Norfolk Southern Railway Company and its engineer, Terry Wayne Clements, had timely filed a Motion for Summary Judgment prior to the original trial setting on May 9, 1994. In the week preceding that setting, the defendants discovered certain documents in the possession of the state and local governments that supported defendants' defense of federal preemption. The defendants were not . . . signatory to these documents and had not previously had knowledge of them. For reasons unrelated to the discovery of these documents, but also in order to have more time to consider the effect of these documents on their claims, plaintiffs requested a continuance of the trial setting on May 9, 1994. The Court offered plaintiffs the option of proceeding with a hearing on defendants' summary judgment motion without consideration of the newly discovered documents and then to trial if the motion was overruled or a continuance with the agreement and understanding of all parties that the Court would have a hearing on the defendants' Motion for Summary Judgment on May 20, 1994, and a new trial setting of May 23, 1994. Plaintiffs elected the option of a continuance and later hearing.
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> "On May 20, a hearing was held and [it] involved a full and complete examination of all matters pertinent to and submitted in support of or [in] opposition to defendants' Motion for Summary Judgment. These essential facts regarding the accident are uncontroverted. The accident occurred at approxi-

mately 6 p.m., February 21, 1988, at the intersection of Pace Street and the Norfolk Southern Railway Company main line in the City of Oxford, Calhoun County, Alabama. The automobile driven by plaintiffs' decedent was northbound and the train was westbound. There were two standard double-faced crossbuck signs, one on each side of the track, and a red and white octagonal "STOP" sign on the south side of the track facing northbound traffic on Pace Street at the crossing at the time of the accident. The Lang vehicle pulled up behind another car stopped in the northbound lane at the crossing, either stopped or almost stopped, then pulled around the other car into the southbound lane and proceeded onto the track where the collision occurred. The train, which was travelling a little less than 40 mph, was within the maximum speed of 60 mph permitted by federal regulations.

"At the conclusion of that hearing, based on the undisputed evidence before it, the Court granted the defendants' Motion for Summary Judgment with respect to any claim predicated on negligence or wantonness as to the speed at which the train involved in the accident was operating and as to any claim of negligence or wantonness predicated on the adequacy of the traffic control devices present at the crossing on the date in question. These claims are preempted by federal law. The facts and basis for the Court's ruling as to preemption on signals is discussed in detail below. Counsel for the plaintiffs stipulated in open court that they neither had nor made any claim with respect to the nature or type or adequacy or inadequacy of the horn with which the locomotive was equipped and, accordingly, the Court dismissed that claim with prejudice.

"Thereafter, the Court conducted a hearing pursuant to [Ala. R. Civ. P.] 56(d). Plaintiffs indicated they would proceed to trial on the issues of whether,

on the occasion in question, the train crew was maintaining proper lookout, whether the train's horn was blown so as to give proper warning of the train's approach, and whether the railroad had negligently maintained the vegetation within the area along its right-of-way it had undertaken to maintain.

"When the case was called for trial on May 23, 1994, counsel for plaintiffs requested an opportunity to be heard again and to submit additional materials on the issue of presumption as to signs and signals. The Court heard further argument and reviewed, as requested, the deposition of plaintiffs' proffered expert, Mr. Archie Burnham. At the conclusion of the arguments, plaintiffs conceded tat they had no evidence of any negligence or wantonness with respect to any claim against Norfolk Southern or its engineer, Mr. Terry Wayne Clements, except for their claim as to the inadequacy of the signs or signals. Plaintiffs also stipulated that the latter claim was not asserted against the engineer.

"In support of their Motion for Summary Judgment, the defendants presented the affidavits of Dykes T. Rushing, E. H. Bentley, Michael P. Bucko, and Shirley Henson. Mr. Rushing is Office Engineer for the Alabama Department of Transportation and is responsible for the oversight of the Alabama State Department of Transportation records of federal aid projects. He is the custodian of those records. He testified that the Pace Street crossing at issue in this case involved participation (including approval and authorization of the project) by the Federal Highway Administration and utilized federal funds for the improvement of that crossing by the installation of warning devices prior to the accident in question. The affidavit of Mr. E.H. Bentley established that companies owned by him held the contracts to perform the work of installing the warning devices at the Pace Street crossing called for by the Federal Aid

Projects authenticated by Mr. Rushing's affidavit and that work was performed and was complete by July, 1979, and that federal funds paid for the construction. Mr. Michael P. Bucko, Financial Manager for the Alabama Division of the Federal Highway Administration, authenticated documents attached to his affidavit pertaining to the Federal Aid Project involving the installation of traffic control warning devices at several railroad-highway crossings in Oxford, including the Pace Street crossing, in 1978 and established that over $167,000.00 in federal funds were expended on that project, which included Pace Street. The affidavit of Ms. Shirley Henson authenticated a Federal Aid Rail Highway Crossing Project Agreement incident to the same projects and established that the City of Oxford agreed to maintain the warning devices after installation. This evidence is not disputed.

"Based on these undisputed facts, this Court concludes that there is no genuine issue of material fact, that federal funds participated in the installation of warning devices at the crossing in issue, and that the defendant Norfolk Southern Railway Company (plaintiffs having stipulated that this claim is not asserted against the engineer) is entitled to a judgment as a matter of law on the plaintiffs' claims seeking to impose liability on the railroad for inadequate warning devices at the crossing. The Court was not presented with any legal authority establishing that under current Alabama law on the facts of this case Norfolk Southern would have had a duty to have . . . signs or signals at this crossing other or different from those that were present, it being undisputed that standard crossbuck signs were in place on both sides of the track as well as a 'STOP' sign on the south side facing northbound traffic at the time of the accident. Nevertheless, assuming without deciding that Alabama law might impose such a duty, this

decision is based on the preemption of such claims on the reasoning set out in and authority of *Borden v. CSX Transportation, Inc.*, 843 F. Supp. 1410 (M.D. Ala. 1993), *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 19 F.3d 547 (10th Cir. 1994) and *Easterwood v. CSX Transportation, Inc.*, [507 U.S. at 668], 113 S. Ct. at 1740-41.

"Plaintiffs point out that some of the pavement markings installed under the Federal Air Projects in 1978 may not have still been present on the date of this accident in 1988. They argue that this abrogated preemption. There are several answers to this. First, no provision of state or federal law imposes on the railroad an obligation to maintain warning devices of the type which were the subject of the federal aid projects and by virtue of which preemption obtains here. Second, the City of Oxford, not the railroad, expressly contracted and agreed to maintain the devices. Third, preemption arises from the exercise of authority, albeit that the exercise of federal authority is in this instance established by proof of a rather mechanical, but substantively important and complex act, i.e., expenditure of federal funds for the installation of passive warning devices. Once federal authority has occupied the field, this Court can find no authority to support the notion that authority may diminish or wear out with passage of time.

"In accordance with the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED, by stipulation of the plaintiffs in open court, that all claims against the defendant, Terry Wayne Clements, are due to be and the same are hereby dismissed with prejudice.

"It is further hereby ORDERED, ADJUDGED AND DECREED that all claims, by stipulation of the plaintiffs in open court, against Norfolk Southern Railway Company, save except the sole claim with

respect to the adequancy of the signs or signals at the crossing, are due to be and the same are hereby dismissed with prejudice to the plaintiffs.

"It is further ORDERED, ADJUDGED AND DECREED by the Court that summary judgment be and the same is hereby entered in favor of the defendant Norfolk Southern Railway Company on the sole remaining claim of the plaintiffs as to the adequacy of the signs or signals at the crossing . . . . Costs are taxed to the plaintiffs."

(C.R. 649-56.)

I agree with conclusion reached by the trial judge in each case. In my opinion, the Supreme Court of the United States in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), held that when federal funds are used in the installation of warning devices at a railroad-highway crossing, and where, as here, there was federal participation in the installation of warning devices, then a cause of action that is based on an alleged inadequate or defective safety practice is preempted.[6]

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[6] *Hatfield v. Burlington N.R.R.*, 507 U.S. 1048 (1993) (remanded for further consideration in light of *CSX Transp. v. Easterwood*); *Elrod v. Burlington N.R.R.*, 68 F.3d 241 (8th Cir. 1995) (motorists' state law negligence claim based on failure to provide adequate warning devices at crossing was preempted); *Thiele v. Norfolk & W. Ry.*, 68 F.3d 179 (7th Cir. 1995); *Hester v. CSX Transp.*, 61 F.3d 382 (5th Cir. 1995), cert. denied, 116 S.Ct. 815, 133 L.Ed.2d 760, 64 USLW 3499, 64 USLW 3501 (U.S., Jan. 22, 1996) (NO. 95-791) (FRSA preempted state law claims based on inadequate signalization at crossing); *Shots v. CSX Transp.*, 38 F.3d 304 (7th Cir. 1994) (held that federal financial assistance in placing reflectorized crossbucks at intersection in question did not preempt state regulation of crossing safety); *Armijo v. Atchison, T. & S.F. Ry.*, 27 F.3d 481 (10th Cir. 1994) (remanded for a factual determination as to whether federal funds participated in the installation of warning devices); *Williams v. Burlington N.R.R.*, 849 F. Supp. 682 (E.D. Ark. 1994) (material issue of fact existed as to whether diagnostic team visited the crossing site to determine proper warning signs); *Hatfield v. Burlington N.R.R.*, 848 F. Supp. 158 (D. Kan. 1994), affirmed by, 64 F.3d 559

Here, the plaintiffs claim that Norfolk Southern was negligent, specifically that it improperly maintained the crossing and thereby made it hazardous. The plaintiffs argue that the doctrine of federal preemption does not apply to their tort claims, and the majority of this Court agrees with their argument, reversing the judgment entered in each case. I must respectfully disagree with the majority's resolution of this legal issue.

The Federal Railroad Safety Act

The Supreme Court of the United States wrote in *Easterwood*, 507 U.S. at 661-62:

> "FRSA was enacted in 1970 'to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons. . . .' 45 U.S.C. § 421. To aid in the achievement of these goals, the Act specifically directs the Secretary of Transportation to study and develop solutions to safety problems posed by grade crossings. § 433. In addition, the Secretary is given broad powers to 'prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety. . . .' § 431(a). The pre-emptive effect of these regulations [adopted by the Secretary] is governed by § 434, which contains express saving and pre-emption clauses."

(10th Cir. (Kan.), Aug. 29, 1995) (NO. 94-3160) (held that fact that federal government explicitly undertook to provide funding for preliminary engineering of crossing upgrade prior to accident was sufficient to trigger federal preemption); *Armstrong v. Atchison, T. & S.F. Ry.*, 844 F. Supp. 1152 (W.D. Tex. 1994) (held that FRSA preempted plaintiff's claim against the railroad; summary judgment entered); *Borden v. CSX Transp.*, 843 F. Supp. 1410 (M.D. Ala. 1993) (negligence and wantonness claims were preempted insofar as they related to defendants' failure to provide and maintain adequate warning devices and insofar as they related to vegetation on and adjacent to railbed).

Section 434 states that "[t]he Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable" and that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement."

In my opinion, the Supreme Court specifically addressed the issue presented here, whether the State tort claim was preempted, in *Easterwood*, holding that "for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection," and that in such instances "[t]he Secretary's regulation . . . cover the subject matter of state law [including tort claims that seek] to impose an independent duty on a railroad to identify and/or repair dangerous crossings." 507 U.S. at 671.

The pertinent sections of the holding in *Easterwood* are provided below:

> "The remaining potential sources of pre-emption are the provisions of 23 CFR §§ 646.214(b)(3) and (4), which, unlike the foregoing provisions, do establish requirements as to the installation of particular warning devices. *Examination of these regulations demonstrates that, when they are applicable, state tort law is pre-empted.* However, petitioner has failed to establish that the regulations apply to [this case], and hence we find respondent's grade crossing claim is not pre-empted.
>
> "As discussed above, *supra*, at 666-667, under §§ 646.214(b)(3) and (4), a project for the improvement of a grade crossing must either include an automatic gate *or receive FHWA approval if federal funds 'participate in the installation of the* [*warning*]

> *devices.'* Thus, unlike the Manual, §§ 646.214(b)(3) and (4) displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. Indeed, §§ 646.214(b)(3) and (4) effectively set the terms under which railroads are to participate in the improvement of crossings. The former section envisions railroad involvement in the selection of warning devices through their participation in diagnostic teams which may recommend the use or nonuse of crossing gates. §§ 646.214(b)(3)(i)(F) and (3)(ii). Likewise, § 646.214(b)(4), which covers federally funded installations at crossings that do not feature multiple tracks, heavy traffic, or the like, explicitly notes that railroad participation in the initial determination of 'the type of warning device to be installed' at particular crossings is subject to the Secretary's approval. In either case, the Secretary has determined that the railroads shall not be made to pay any portion of installation costs. § 646.210(b)(1) [(1992)]. *In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.*"

507 U.S. at 670-71 (emphasis added).

In view of the holding in *Easterwood*, I believe that the trial courts properly entered the summary judgment in each of these cases.

The majority cites *Michael v. Norfolk Southern Ry.*, 74 F.3d 271 (11th Cir. 1996), for the proposition that preemption does not apply in these cases. However,

Michael dealt with a situation in which the railroad negligently installed a crossing arm that the plaintiffs alleged was shorter than those authorized by FRSA regulations. In *Michael*, the Eleventh Circuit held:

> "The provisions of 23 C.F.R. §§ 646.214(b)(3) and (4), where applicable, preempt state tort law. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 670, 113 S.Ct. 1732, 1740-41, 123 L.Ed.2d 387 (1993). For railroad crossing projects 'in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection.' Id. at 670, 113 S.Ct. at 1741. Thus there can be no state law claim against the railroad for defective design. Id. The crossing devices at issue in this case were federally funded, and so the state tort claim for defective design is preempted, so long as the railroad complied with the federal regulations."
>
> "However, the plaintiffs contend that [Norfolk Southern] violated federal regulations by installing a gate arm shorter than the one called for in the design."

Michael, 74 F.3d at 273.

I realize that these cases have come to us on appeals from summary judgments: however, the operative facts seem to be admitted. I believe that the plaintiffs' claims are preempted and I agree with the decisions of both trial courts; therefore, I must respectfully dissent.

Houston, J., concurs.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

November 22, 1996

1931221

DOUGLAS K. HAMLIN, as conservator of the estate of Cinda S. Karjala, an incapacitated person

v.

NORFOLK SOUTHERN RAILWAY COMPANY and DANNY STEVE GARNER
(Madison: CV-91-2523)

1931292

BRUCE LANG and PEGGY LANG

v.

SOUTHERN RAILWAY, *et al.*
(Calhoun: CV-90-786)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

Hooper, CJ., Maddox, Almon, Shores, Houston and Kennedy, JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT
OF MADISON COUNTY, ALABAMA

Case No. CV91-2523B

CINDA S. KARJALA,
Plaintiff

FORTIS BENEFITS INSURANCE COMPANY,
Plaintiff/Intervenor

vs.

NORFOLK SOUTHERN RAILWAY COMPANY, INC.,
a corporation, *et al.*,
Defendants

ORDER ON MOTION FOR SUMMARY JUDGMENT

This matter is presented to the Court on various motions including the defendant's motion for summary judgment. Because this Court is of the opinion that the plaintiff's claims against the defendants for negligence and wantonness are preempted by the Federal Railroad Safety Act of 1970 (FRSA) 45 USC §§ 421-447 (1988 and Supp. II 1990), it is necessary only to address the defendants' motion for summary judgment based on the claim of preemption.

In this case, the plaintiff seeks to recover from the defendants damages for personal injuries which she claims resulted from the defendants' negligence and/or wantonness in the maintenance of a railroad crossing located on Brock Road in Madison County, Alabama. On the occasion of the accident made the basis of this suit, the plaintiff drove her motor vehicle into the 106th train car of

the defendants' train. The accident occurred at night and in patchy fog.

The plaintiff's claims are based on allegations that the crossing was ultra hazardous; that the defendants failed to provide and maintain adequate warning devices at the crossing; and, that the defendants were negligent and/or wanton in failing to have illumination devices on the side of its train cars.

In support of its motion for summary judgment, the defendants have presented the affidavit of Dykes T. Rushing, Office Engineer for the Alabama Department of Transportation, who is responsible for the oversight of the Alabama State Department of Transportation Records of Federal Aid Projects. He is also the custodian of those records. He testified that the Brock Road crossing at issue in this case involved participation by the Federal Highway Administration and utilized federal funds for the improvement of that crossing including the installation of warning devices. This evidence is not disputed.

Based on these undisputed facts, this Court concludes that there is no genuine issue of material facts and the defendants are entitled to a judgment as a matter of law on the plaintiff's claims of failure to provide and maintain adequate warning devices at the crossing. This decision is based on the preemption of such claims as set out in *Borden v. CSX Transportation*, 843 F Supp. 1410 (MD Ala 1993) and *Easterwood v. CSX Transportation*, 113. S. Ct. at 1740-41.

With regard to the plaintiff's claims that the defendants failed to have illumination devices on its train cars, this Court finds that there is no federal or state duty to provide such illumination devices. The Federal Railway Safety Act regulations occupy the field of warning devices and railroad safety so as to preempt any state law requirements for such illumination devices. Accordingly, the Court finds that summary judgment is due to be granted in favor of the defendants as to that claim.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that summary judgment be and the same is hereby entered in favor of the defendants on the claims of the plaintiff and that this cause be and the same is hereby dismissed with prejudice. Costs are taxed to the plaintiff.

/s/ Daniel B. Banks, Jr.
DANIEL B. BANKS, JR.
Circuit Judge

APPENDIX D

IN THE CIRCUIT COURT
OF CALHOUN COUNTY, ALABAMA

Civil Action No. CV 90-786

BRUCE AND PEGGY LANG, Parents and next friend of DAVID ALAN LANG, their deceased minor son,
Plaintiffs,

VS.

NORFOLK SOUTHERN RAILWAY COMPANY; TERRY WAYNE CLEMENTS; *et al*;
Defendants.

ORDER AND JUDGMENT

The matters addressed by this Order have been the subject of several hearings as well as two trial settings in the last three weeks. The defendants, Norfolk Southern Railway Company and its engineer, Terry Wayne Clements, had timely filed a Motion for Summary Judgment prior to the original trial setting on May 9, 1994. In the week preceding that setting, the defendants discovered certain documents in the possession of the state and local governments that supported defendants' defense of federal preemption. The defendants were not a signatory to these agreements and had not previously had knowledge of them. For reasons unrelated to the discovery of these documents, but also in order to have more time to consider the effect of these documents on their claims, plaintiffs requested a continuance of the trial setting on May 9, 1994. The Court offered plaintiffs the option of proceeding with a hearing on defendants' summary judgment motion without consideration of the newly discov-

ered documents and then to trial if the motion was overruled or a continuance with the agreement and understanding of all parties that the Court would have a hearing on the defendants' Motion for Summary Judgment on May 20, 1994, and a new trial setting of May 23, 1994. Plaintiffs elected the option of a continuance and later hearing.

On May 20, a hearing was held and involved a full and complete examination of all matters pertinent to and submitted in support of or opposition to defendants' Motion for Summary Judgment. These essential facts regarding the accident are uncontroverted. The accident occurred at approximately 6 p.m., February 21, 1988, at the intersection of Pace Street and the Norfolk Southern Railway Company mainline in the City of Oxford, Calhoun County, Alabama. The automobile driven by plaintiffs' decedent was northbound and the train was westbound. There were two standard double-faced crossbuck signs, one on each side of the track, and a red and white octagonal "STOP" sign on the south side of the track facing northbound traffic on Pace Street at the crossing at the time of the accident. The Lang vehicle pulled up behind another car stopped in the northbound lane at the crossing, either stopped or almost stopped, then pulled around the other car into the southbound lane and proceeded onto the track where the collision occurred. The train, which was travelling a little less than 40 mph, was within the maximum speed of 60 mph permitted by federal regulations.

At the conclusion of that hearing, based on the undisputed evidence before it, the Court granted the defendants' Motion for Summary Judgment with respect to any claim predicated on negligence or wantonness as to the speed at which the train involved in the accident was operating and as to any claim of negligence or wantonness predicated on the adequacy of the traffic control devices present at the crossing on the date in question.

These claims are preempted by federal law. The facts and basis for the Court's ruling as to preemption on signals is discussed in detail below. Counsel for plaintiffs stipulated in open court that they neither had nor made any claim with respect to the nature or type or adequacy or inadequacy of the horn with which the locomotive was equipped and, accordingly, the Court dismissed that claim with prejudice.

Thereafter, the Court conducted a hearing pursuant to ARCP 56(d). Plaintiffs indicated they would proceed to trial on the issues of whether, on the occasion in question, the train crew was maintaining a proper lookout, whether the train's horn was blown so as to give proper warning of the train's approach, and whether the railroad had negligently maintained the vegetation within the area along its right-of-way it had undertaken to maintain.

When the case was called for trial on May 23, 1994, counsel for plaintiffs requested an opportunity to be heard again and to submit additional materials on the issue of preemption as to signs and signals. The Court heard further argument and reviewed, as requested, the deposition of plaintiffs' proffered expert, Mr. Archie Burnham. At the conclusion of the arguments, plaintiffs conceded that they had no evidence of any negligence or wantonness with respect to any claim against Norfolk Southern or its engineer, Mr. Terry Wayne Clements, except for their claim as to the inadequacy of the signs or signals. Plaintiffs also stipulated that the latter claim was not asserted against the engineer.

In support of their Motion for Summary Judgment, the defendants presented the affidavits of Dykes T. Rushing, E. H. Bentley, Michael P. Bucko, and Shirley Henson. Mr. Rushing is Office Engineer for the Alabama Department of Transportation and is responsible for the oversight of the Alabama State Department of Transportation records of federal aid projects. He is the custodian of those records. He testified that the Pace Street crossing

at issue in this case involved participation (including approval and authorization of the project) by the Federal Highway Administration and utilized federal funds for the improvement of that crossing by the installation of warning devices prior to the accident in question. The affidavit of Mr. E. H. Bentley established that companies owned by him held the contracts to perform the work of installing the warning devices at the Pace Street crossing called for by the Federal Aid Projects authenticated by Mr. Rushing's affidavit and that that work was performed and was complete by July, 1979, and that federal funds paid for the construction. Mr. Michael P. Bucko, Financial Manager for the Alabama Division of the Federal Highway Administration, authenticated documents attached to his affidavit pertaining to the Federal Aid Project involving the installation of traffic control warning devices at several railroad-highway crossings in Oxford, including the Pace Street crossing, in 1978 and established that over $167,000.00 in federal funds were expended on that project, which included Pace Street. The affidavit of Ms. Shirley Henson authenticated a Federal Air Rail Highway Crossing Project Agreement incident to the same projects and established that the City of Oxford agreed to maintain the warning devices after installation. This evidence is not disputed.

Based on these undisputed facts, this Court concludes that there is no genuine issue of material fact, that federal funds participated in the installation of warning devices at the crossing in issue, and that the defendant Norfolk Southern Railway Company (plaintiffs having stipulated that this claim is not asserted against the engineer) is entitled to a judgment as a matter of law on the plaintiffs' claims seeking to impose liability on the railroad for inadequate warning devices at the crossing. The Court was not presented with any legal authority establishing that under current Alabama law on the facts of this case Norfolk Southern would have had a duty to have had signs or signals at this crossing other or different from

those that were present, it being undisputed that standard crossbuck signs were in place on both sides of the track as well as a "STOP" sign on the south side facing northbound traffic at the time of the accident. Nevertheless, assuming without deciding that Alabama law might impose such a duty, this decision is based on the preemption of such claims on the reasoning set out in and authority of *Borden vs. CSX Transportation,* 843 F. Supp. 1410 (M.D. Ala. 1993), *Armijo vs. Atchison, Topeka & Santa Fe Ry.*, 19 F.3d 547 (10th Cir. 1994) and *Easterwood vs. CSX Transportation,* —— U.S. ——, 113 S.Ct. 1732, 1740-41, 123 L. Ed. 2d 387 (1993).

Plaintiffs pointed out that some of the pavement markings installed under the Federal Aid Projects in 1978 may not have still been present on the date of this accident in 1988. They argue that this abrogated preemption. There are several answers to this. First, no provision of state or federal law imposes on the railroad an obligation to maintain warning devices of the type which were the subject of the federal aid projects and by virtue of which preemption obtains here. Second, the City of Oxford, not the railroad, expressly contracted and agreed to maintain the devices. Third, preemption arises from the exercise of authority, albeit that the exercise of federal authority is in this instance established by proof of a rather mechanical, but substantively important and complex act, i.e., expenditure of federal funds for the installation of passive warning devices. Once federal authority has occupied the field, this Court can find no authority to support the notion that that authority may diminish or wear out with passage of time.

In accordance with the foregoing, it is hereby ORDERED, ADJUDGED and DECREED, by stipulation of the plaintiffs in open court, that all claims against the defendant, Terry Wayne Clements, are due to be and the same are hereby dismissed with prejudice.

It is further hereby ORDERED, ADJUDGED and DECREED that all claims, by stipulation of the plaintiffs in open court, against Norfolk Southern Railway Company, save and except the sole claim with respect to the adequacy of the signs or signals at the crossing, are due to be and the same are hereby dismissed with prejudice to the plaintiffs.

It is further ORDERED, ADJUDGED and DECREED by the Court that summary judgment be and the same is hereby entered in favor of the defendant Norfolk Southern Railway Company on the sole remaining claim of the plaintiffs as to the adequacy of the signs or signals at the crossing and that this cause be and the same is hereby dismissed with prejudice. Costs are taxed to the plaintiffs.

DONE and ENTERED this 26th day of May, 1994.

/s/ Malcolm B. Street, Jr.
MALCOLM B. STREET, JR.
Circuit Judge

Supreme Court, U.S.
FILED
MAR 24 1997
CLERK

No. 96-1332

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

NORFOLK SOUTHERN RAILWAY COMPANY
and DANNY STEVE GARNER,
Petitioners,

v.

BRUCE LANG, PEGGY LANG and
DOUGLAS K. HAMLIN,
conservator of the estate of CINDA S. KARJALA,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Alabama

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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March 24, 1997

24pp

QUESTION PRESENTED

Whether the Federal Railroad Safety Act, as interpreted by this Court in *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658 (1993), pre-empts all state tort claims and effectively immunizes rail carriers against any claims arising out of their failure to exercise ordinary care in the maintenance of existing warning devices and for their failure to warn of known dangerous conditions.

LIST OF INTERESTED PARTIES

All of the parties to this proceeding are correctly listed in the caption of the petition for writ of certiorari, with the exception that Fortis Benefits Insurance Company was a Plaintiff/Intervenor in the *Hamlin v. Norfolk Southern* case.

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No. 96-1332

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

NORFOLK SOUTHERN RAILWAY COMPANY
and DANNY STEVE GARNER,
Petitioners,

v.

BRUCE LANG, PEGGY LANG and
DOUGLAS K. HAMLIN,
conservator of the estate of CINDA S. KARJALA,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Alabama

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents request that the Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the Supreme Court of Alabama.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama was entered on July 12, 1996 and is reported at 686 So.2d 1115 (Ala. 1996). The opinion is included in the Appendix to the petition at 1a-24a. The opinions of the Circuit Court of Madison County, Alabama and the Circuit Court of Calhoun County, Alabama are not reported and are included in the Appendix to the petition at 26a-34a.

JURISDICTION

The respondents do not dispute the petitioner's statement regarding the Court's jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 205 of the Federal Railroad Safety Act, previously codified at 45 U.S.C. § 434, and currently codified at 49 U.S.C. § 20106, provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. **A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.**

(Emphasis added) (The emphasized portion was not included in the quotation of this provision in the petition).

STATEMENT OF THE CASE

The present case involves two separate accidents in which the petitioner's trains collided with motor vehicles driven by Alabama residents. One of these collisions resulted in the total incapacitation of Cinda Karjala, while the other collision resulted in the death of David Lang. Respondent Douglas K. Hamlin is the conservator for his

mother, Ms. Karjala, while respondents Bruce and Peggy Lang are the representatives of their son David's estate. Although the petition merely states that these accidents are "similar," there are a number of factual differences between the two incidents.

a). Hamlin v. Norfolk Southern

On November 23, 1991 at 4:00 a.m., Cinda Karjala ("Karjala") left to visit her mother in Virginia and was driving south during darkness, on Brock Road, a rural road located in Madison County, Alabama. Patchy fog was in the area, and the fog was dense at the crossing. (C. 96-104; 331-332; 334). ("C" refers to the Clerk's Record on appeal).

Brock Road intersects with a rail line of the petitioner, Norfolk Southern, and the grade crossing was owned and under the control of the petitioner. The Brock Road crossing is located at a place where the climatological factors, combined with the topography and geography in the general area of the crossing, have a propensity to be engulfed in fog at various times during the year. (C. 98; 331-332).

The Brock Road crossing did not have any type of active warning devices (lights, bells or gates), but was marked only with passive signs. The crossing was not illuminated. (C. 96-104; 273-275; 277-279). The Brock Road crossing involved a high volume of vehicular traffic, a high number of train movements, a substantial number of school buses and trucks carrying hazardous materials. In addition, the crossing had unusually restricted sight distance and had experienced continuing accident occurrences. Because the Brock Road crossing exhibited hazardous features listed in 23 C.F.R. § 646.214(b)(3), automatic signals and gates should have been installed. There was no evidence that a diagnostic team had excused the absence of active signals and gates.

Karjala drove into the side of the Norfolk train during the time that the train obstructed the crossing. Karjala did not apply her brakes before the collision. Because of the fog, Karjala was not able to see the signs, nor the train. Karjala, therefore, was not aware of the danger of the presence of the train at the crossing. (C. 197; 360; 363-368; 371-378).

The engineer/driver of the train, petitioner Danny Steve Garner ("Garner"), was aware of the fog because, as he was driving the petitioner's train westwardly, he had encountered fog beginning at Nickajack Lake in Tennessee. Garner also had talked by radio to another train engineer, who had commented on the fog. (C. 334-338).

The petitioner's trainmaster, Bryan Harres ("Harres"), was also aware of the dense fog prior to approaching the Brock Road crossing. Harres was driving on the public highway following the train through the fog from Chattanooga to its intended destination in Sheffield, Alabama. (C. 341-357).

In 1984, the Alabama Highway Department, in coordination with the Federal Highway Administration, developed preliminary plans for upgrading the Brock Road crossing, with proposed installation of signals with bells and markings. The Alabama Highway Department requested financial participation by the Madison County Commission. (C. 379-380). The Madison County Commission agreed to participate in the construction costs for such installation. (C. 381). The installation of these active warning devices was never begun. (C. 273-275).

In the trial court, the respondent established the hazardous nature of the Brock Road crossing through the affidavit of a liability expert, Dr. Kenneth W. Heathington. (C. 256-436).

As a result of the collision, Karjala suffered severe permanent personal injuries, disfigurement, brain damage, paralysis, disability and impairment. Karjala incurred

over $1,100,000.00 in medical expenses and over $230,000.00 in lost wages. Future medical expenses were projected at over $5,000,000.00, and future loss of wages was projected at over $945,000.00. (C. 197).

Karjala was declared incompetent by the Probate Court of Madison County, Alabama, and her son, respondent Douglas K. Hamlin, was appointed as her conservator. (C. 109).

b). Lang v. Norfolk Southern

David Alan Lang was killed when a train owned and operated by the petitioner collided with his motor vehicle at a grade crossing in the City of Oxford, Alabama on February 21, 1988 (C. 128). The accident occurred at the intersection of a two-lane road known as Pace Street with the Atlanta-to-Birmingham main line of Norfolk Southern. Pace Street, which runs north-south, crosses the petitioner's line, which runs east-west, in a perpendicular fashion.

At the time of the accident, passive warning devices were present in the form of a standard white crossbuck with black lettering, and in the form of a red octagonal STOP sign with white lettering, both located to the right-hand side of the crossing. (C. 129, 650). There was evidence presented to the trial court that this red STOP sign was smaller by 33% than the minimum size required by the Manual on Uniform Traffic Control Devices. (C. 718). The evidence presented to the trial court established that, while an advance warning sign had been painted on the road at some point prior to the accident, the painted warnings were no longer visible. (C. 256, 735, 788-90). In fact, evidence was presented that the advance warning sign was missing altogether (C. 251, 718). No other warning devices, active or passive, were in place on the south side of the Pace Street crossing. The evidence presented to the trial court also established that vegeta-

tion and brush had been allowed to grow up and had obstructed sight lines to the southeast of the crossing. (C. 183, 189-90, 203).

The track through the Pace Street crossing is classified as Class 4, meaning that freight trains can operate at speeds of up to 60 m.p.h., and passenger trains at speeds of up to 80 m.p.h. (C. 147, 210). The petitioner's representative testified that its track speed for the crossing was 50 m.p.h., slowing to a curve speed of 40 m.p.h. immediately below the crossing. (C. 173). Evidence was introduced of a traffic flow of approximately 1,200 vehicles a day through the Pace Street crossing. (C. 700-01). The Pace Street crossing, therefore, experienced a high volume of vehicular traffic and an unusually restricted sight distance. Because the Pace Street crossing exhibited hazardous features listed in 23 C.F.R. § 646.214(b)(3), automatic signals and gates should have been installed. There was no evidence that a diagnostic team had excused the absence of active signals and gates.

Prior to the collision, David Lang was operating his vehicle in the northbound lane of Pace Street. (C. 129). The petitioner's train — a five-engine, 102-car freight train — was proceeding west. (C. 129, 166). The engineer of the train testified that he put the train "in emergency" (i.e., activated the train's emergency braking), a matter of feet from the point of impact with Lang's vehicle, but was unable to avoid hitting Lang. (C. 175).

Archie Burnham, one of the Langs' designated experts testified that the crossing was unduly hazardous. (C. 706). Burnham rested his opinion, in part, upon the fact that the "crossing was not provided with the standard and minimum traffic control devices," based upon the Manual on Uniform Traffic Control Devices to ascertain the applicable standard. (C. 717).

Evidence was also introduced as to the petitioner's vegetation control practices. James Heard, the petitioner's

track supervisor for the portion of track from Austell, Georgia to Anniston, Alabama, testified that he was in charge of spraying and bushhogging weeds and brush along the track. (C. 456, 460). Heard testified that the brush was cut every two to three years and that weeds were spray-controlled twice a year. (C. 460-61). Heard testified that the purpose of these activities was to try to keep the vegetation from getting too close to the tracks preventing the general public from seeing the approaching trains. (C. 461). Heard did not remember the last time that the Pace Street crossing had been cut. (C. 475). He testified that his assistant patrolled through the Pace Street crossing twice a week by hy-rail looking for defects in track structure, overgrown vegetation, etc. (C. 491-92). Heard also testified that he periodically asked landowners for permission to cut brush off their land that might obstruct the view of the tracks at crossings, and that he had never been denied permission to do this. (C. 468). Heard could not recall ever asking anyone for permission to clear vegetation at the Pace Street crossing. (C. 469). Attached to Heard's deposition was an exhibit that demonstrated the petitioner's policy to periodically cut vegetation on railroad property that interfered with view of the tracks. (C. 536).

REASONS FOR DENYING THE PETITION

a). This Court has historically been very reluctant to find federal pre-emption of state law. As the Court has noted, "consideration of issues arising under the Supremacy Clause start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In addition, there is a heavy presumption against preemption of state

tort causes of action that would leave injured plaintiffs without a remedy. Because "the regulation of health and safety matters is primarily and historically, a matter of local concern," *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985), the presumption against preemption "is particularly apt" in the area of railroad safety. *Rogers v. Consolidated Rail Corp.*, 948 F.2d 858, 859 (2d Cir. 1991).

This presumption against pre-emption arises from the "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981), and is not merely a rule of construction. Instead, the presumption is an essential principle of judicial restraint that preserves our system of federalism by "avoiding unintended encroachments on the authority of the States." *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

In light of these fundamental concerns, "[t]he presumption against pre-emption is even stronger against pre-emption of state remedies, like tort recoveries, when no federal remedies exist." *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir. 1988). As this Court explained in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U.S. at 251. Justice Blackmun, dissenting in *Silkwood*, was equally emphatic on this point: "The absence of federal regulation governing the compensation of victims is strong evidence that Congress intended the matter to be left to the States." 464 U.S. at 264 n. 7.

The presumption against preemption is not limited to the determination of whether a federal statute pre-empts state law. Even when Congress has explicitly provided for pre-emption, the presumption requires that the courts give "a narrow interpretation of such an express com-

mand." *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240, 2250 (1996) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992)). In fact, the Court followed this principle to construe the express pre-emption language in the Federal Railroad Safety Act narrowly "in light of the presumption against preemption." *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 668 (1993).

The Court's decisions in *Medtronic, Cipollone* and *Easterwood* involved legislation that was intended by Congress to enhance public safety and, in interpreting the statutes at issue in those cases, the Court preserved state tort causes of action despite express Congressional intent to pre-empt state statutory and administrative regulation.

The Court has previously noted that common-law actions exert only an "incidental regulatory effect," that is less intrusive on federal interests than direct state regulation. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). It is therefore not inconsistent for Congress to assert broad federal regulatory authority over an activity "while at the same time allowing plaintiffs . . . to recover for injuries." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984). As the *Cipollone* plurality stated, "there is not general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions." 505 U.S. at 518. It is conceivable that the availability of compensatory damages may even "complement the federal regulatory standards." *Silkwood*, 464 U.S. at 264 (Blackmun, J., dissenting).

The Court recently addressed the express preemption provision of the Medical Devices Amendments to the Food, Drug and Cosmetics Act, and observed:

> Medtronic's construction of 360k would therefore have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Con-

> gress, needed more stringent regulation in order "to provide for the safety and effectiveness of medical devices intended for human use," . . . . It is, to say the least "difficult to believe that congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 . . .

Medtronic, Inc. v. Lohr, 116 S.Ct. at 2251.

The alleged pre-emption under the FRSA raises precisely the same concern. As this Court pointed out in *Easterwood*:

> [C]ontrary to the view of the Court of Appeals for the Tenth Circuit, it does not necessarily follow that "[t]he hit-or-miss common law method runs counter to a statutory scheme of planned prioritization." *Hatfield v. Burlington Northern R. Co.*, 958 F.2d 320, 324 ([10th Cir.] 1992). In fact, the scheme of negligent liability could just as easily complement these regulations by encouraging railroads — the entities arguably most familiar with crossing conditions — to provide current and complete information to the state agency responsible for determining priorities for improvement projects.

507 U.S. at 1739.

"The purpose of Congress is the ultimate touchstone" in deciding whether a federal statute pre-empts state law. *Medtronic*, 116 S.Ct. at 2250; *Cipollone*, 505 U.S. at 516. Congress did not enact the FRSA for the purpose of immunizing railroads from liability for negligence, though that is an effect where there has been full compliance with the regulations. *Easterwood*, 507 U.S. at 671. Rather, Congress enacted the FRSA for the purposes of "promoting safety in all areas of railroad operations" and to permit the establishment of nationally uniform regulations and standards. 45 U.S.C.A. § 421 *et seq.*; H.R. REP. NO.

1194, 91st Cong., 2nd Sess. 11, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS, 4104, 4105-4108. Indeed it was Congress' objective that "every railroad crossing in America [would] be provided with modern, up-to-date adequate protection to the risks of each crossing." H.R. REP. No. 118, 93d Cong. 1st Sess, reprinted in 1973 U.S.C.C.A.N. 1859, 1892.

b). The petitioner argues that this Court in *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658 (1993) began the process of determining under 45 U.S.C. § 434 the pre-emptive effect of federal safety regulations on state tort duties imposed on railroads arising out of grade crossing accidents. The issue before the Court in *Easterwood* was to determine to what extent the Federal Railroad Safety Act of 1970 ("FRSA"), pre-empts state tort claims. 507 U.S. at 661. In *Easterwood,* the Court stated:

> The pre-emptive effect of these regulations is governed by § 434, which contains express saving and pre-emption clauses... **Even after federal standards have been promulgated, the States may adopt more stringent safety requirements "when necessary to eliminate or reduce an essentially local safety hazard," if those standards are "not incompatible with" federal laws or regulations and not an undue burden on interstate commerce.**

507 U.S. at 661 (emphasis added).

The petitioner argues that *Easterwood* mandates the pre-emption of the respondents' state tort claims through the application of 23 C.F.R. §§ 646.214(b). Under 23 C.F.R. §§ 646.214(b), a project for the improvement of a grade crossing must either include an automatic gate or receive Federal Highway Administrator ("FHWA") approval if federal funds "participate in the installation of the [warning] devices." 507 U.S. at 670. As the Court stated in *Easterwood,* "examination of these regulations demonstrates that, **when they are applicable,**

state law is pre-empted." 507 U.S. at 670 (emphasis added).

In the present case, the petitioner contends that merely because federal funds were used for the installation of the warning devices all of the respondents' state law claims are pre-empted. In support of this contention, the petitioner relies on 23 C.F.R. §§ 646.214(b)(3) and (4). In *Easterwood* the Court held that these provisions "displace state and private decision making authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." 507 U.S. at 670. As the Court concluded: "In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection." 507 U.S. at 671.

Although this Court's decision in *Easterwood* makes it clear that if the regulations apply the FRSA relieves railroads of responsibility for the choice of the safety devices to be installed, and even as to the responsibility for the installation of such devices, *Easterwood* does not stand for the proposition that the FRSA or 23 C.F.R. §§ 646.214(b)(3) were intended to relieve the railroads of **all** responsibilities for grade crossings once the new devices were chosen and installed.

The petitioner's argument is that merely because federal funds were used in the installation of new devices at grade crossings, the petitioner is no longer legally responsible for, or has any duties whatsoever with regard to those grade crossings. The petitioner seems to suggest that because federal funds might have been used in the selection and installation of safety devices, the railroad is no longer responsible for the maintenance and warning of dangerous conditions at the crossings. Such a holding would obviously leave the petitioner and other rail carriers free to abdicate all responsibility and to simply close their eyes to known dangers at thousands of crossings

across the nation. Essentially, if this Court were to accept the petitioner's argument, the Court would be sanctioning gross negligence or even willful misconduct on the part of rail carriers, so long as it occurs at a grade crossing containing a federally funded safety device.

c). The petitioner's argument for expanded pre-emption in this case is wholly dependent on its assertion that pre-emption applies **automatically** merely because federal funds were used to install safety devices at these crossings. Neither the FRSA, the regulations promulgated pursuant thereto, nor this Court's decision in *Easterwood* support this assertion. In *Easterwood*, the Court noted that "under §§ 646.214(b)(3) and (4), a project for the improvement of a grade crossing must either include an automatic gate or receive FHWA approval if federal funds 'participate in the installation of the warning device.'" 507 U.S. at 670. It is, of course, undisputed that neither of the crossings at issue in the present case had automatic gates. Therefore, in order for the regulations to afford the petitioner any protection in these cases, it is incumbent upon the petitioner to establish that the absence of automatic gates at these crossings received the approval of the FHWA. The petitioner, however, has failed to produce any evidence that these crossings received such approval. As a consequence, as a practical matter, the petitioner failed to carry its burden of proof that it was entitled to any protection under the FRSA.

In reality, *Easterwood* determined that the FRSA pre-empted state law within narrowly drawn circumstances. The only regulations "covering the subject matter" of state tort liability within the meaning of the FRSA are 23 C.F.R. § 646.214(b)(3) and (b)(4). Those regulations "effectively set the terms under which railroads are to participate in the improvement of crossings." *Easterwood*, 507 U.S. at 670. In *Easterwood*, the Court certainly held that the use of federal funds in the improvement of the cross-

ing is essential to pre-emption. However, the Court used the plural, indicating that the use of federal funds was only one of "the preconditions for the application of either regulation." 507 U.S. at 671.

The text of the regulations in question states the general requirement that all grade crossings be equipped with automatic gates and flashers. However, the regulations provide two exceptions. If the hazardous conditions enumerated in §646.21(b)(3)(i) do not exist, or if in individual cases a diagnostic team, including representatives from the state and the railroad, justifies that gates are not needed, then the crossing comes within the catch-all provision of (b)(4), which does not require automatic gates, but does require federal approval of the project.

The plain text of the regulations indicates that compliance with the regulation requires *either* automatic gates or an appropriate determination based on conditions at the particular crossing that the (b)(3) conditions do not exist or do not warrant automatic gates. *See, e.g., Michael v. Norfolk Southern Ry. Co.*, 74 F.3d 271 (11th Cir. 1996) ("We leave it to the District Court on remand to determine whether Norfolk complied with the federal regulations in this regard. If not, then the plaintiffs do have a state law tort claim for negligent design or construction, based on the violation of the federal regulations.").

It is not disputed that federal funds were expended to install crossbucks at the crossings involved in the present cases. However, it is also not disputed that some of the conditions listed in § 646.21(b)(3)(i) were present at each of these crossings. As a result, the crossbuck signs in place at these crossings could only be deemed adequate if a diagnostic team had justified the absence of automatic gates and the FHWA had approved the plan. The petitioner, however, failed to prove that any diagnostic team had made such a determination for either of the crossings involved in the present cases.

Because the "burden is on the party claiming preemption to demonstrate its existence," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), the burden was on the petitioner to prove that the preconditions under the regulations were met. *See Easterwood*, 507 U.S. at 670 ("petitioner has failed to establish that the regulations apply to these cases, and hence we find respondent's grade crossing claim is not preempted.") In the present case, the petitioner's failure to establish that the regulations apply to the Brock Road and Pace Street crossings is fatal to its pre-emption claim.

d. The petitioner's contention that the decision of the Alabama Supreme Court is contrary to the holdings of three federal courts of appeals is unsupported by a close reading of those other decisions. In all three cases, the courts found pre-emption under 23 C.F.R. § 646.21(b)(4) because the crossings were not covered by 23 C.F.R. § 646.21(b)(3). In the present case, (b)(4) has no application because both of the crossings exhibit conditions specified in (b)(3)(i).

In *Elrod v. Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1995), for example, the court held that the "crossing in this case falls within the purview of the latter catch-all provision, 23 C.F.R. § 646.21(b)(4), because none of the triggering conditions found in 23 C.F.R. § 646.21(b)(3) were present at that particular crossing." 68 F.3d at 243 n. 5.

Similarly, in *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996), the court expressly noted: "Of course, passive warning devices are not adequate where section 646.214(b)(3) applies, but it seems clear on the facts before us that the applicable provision is section 646.214(b)(4)." 61 F.3d at 386 n. 6.

The petitioner's reliance on *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996) is also

misplaced. In *Armijo*, contrary to the presumption against pre-emption, the court "**assume[d]** the Secretary of Transportation made a finding the crossbucks were adequate under 23 C.F.R. § 646.21(b)(4)." 87 F.3d at 1193 (emphasis added). Only the dissent by Judge Ebel recognized the significance of the majority's "assumption." 87 F.3d at 1193-94 (Ebel, J., dissenting).

In addition, in all three cases relied on by the petitioner, the courts expressly noted that there were negligence claims against the rail carriers that were not pre-empted even if 23 C.F.R. § 646.21(b)(4) applies. In *Hester*, for example, the court observed that while the plaintiffs' claims based on inadequate signalization were pre-empted, the plaintiffs' remaining negligence theories proceeded to trial. *Hester*, 61 F.3d at 384. Those remaining theories included claims

> that the visibility at the crossing was so obstructed by vegetation as to make the crossing ultrahazardous, that the crew failed to keep a proper lookout for approaching motorists, that the train was not blowing its whistle as it approached the crossing, that the crew failed to blow the warning whistle once they spotted the car, and that the crew failed to use reasonable care in applying the emergency braking system once they determined that the car was not going to stop.

61 F.3d at 384 n. 1. Similarly, the court in *Elrod* noted that the "[p]laintiffs' other claims proceeded to trial, with the jury returning a verdict on interrogatories in favor of [the rail carrier]." 68 F.3d at 243 n. 4. The other claims in *Elrod* included claims that the rail carrier was negligent

> (1) in failing to blow its horn when approaching the intersection; ... (4) in altering its policy not to require a brakeman on the train; (5) in failing to warn the Plaintiffs of existing hazards

> at the intersection; and (6) in allowing the view at the crossing to become obscured by overgrown weeds.

Elrod v. Burlington Northern RR, Nos. J-C-92-270, J-C-92-271, 1993 WL 667635 at *1 (E. D. Ark. Sept. 17, 1993). In *Armijo*, in addition to the claim that the railroad "negligently or recklessly failed to provide adequate warnings" at the crossing, the plaintiff also made a claim that the rail carrier "negligently operated the train" through the crossing. 87 F.3d at 1188. These claims were not held to be pre-empted, but were voluntarily dismissed by the plaintiff prior to appeal. 87 F.3d at 1189.

In the present cases, the respondents raised claims relating to the petitioner's negligence that were unrelated to any claim of inadequate warning signs. These additional claims were clearly not subject to pre-emption even if 23 C.F.R. § 646.21(b)(4) applied to the crossings at which the collisions occurred.

Instead of relying on the cases cited by the petitioner, the Supreme Court of Alabama correctly relied on *Michael v. Norfolk Southern Ry.*, 74 F.3d 271 (11th Cir. 1996), when it decided the present case. In *Michael*, the Eleventh Circuit stated:

> The Supreme Court in *Easterwood* held that 23 C.F.R. §§ 646.214(b)(3) and (4), where applicable, pre-empt state tort law. However those regulations deal with the design and installation of new warning devices, not the maintenance of those devices or the failure to warn the public of defective devices. Thus 23 C.F.R. §§ 646.214(b)(3) and (4) are not applicable to a claim for negligent maintenance or for a failure to warn, and do not pre-empt such claims.

Michael, 74 F.3d at 273.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 96-1332

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NORFOLK SOUTHERN RAILWAY COMPANY
and DANNY STEVE GARNER,
Petitioners,

v.

BRUCE LANG, PEGGY LANG and DOUGLAS K. HAMLIN
conservator of the estate of Cinda S. Karjala,
Respondents,

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Norfolk Southern Railway Company, has consented to AAR's filing of a brief.[1] Respondents, Lang and Hamlin, have refused consent.

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and

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[1] The letter expressing consent has been filed with the Clerk of the Court.

Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

Grade crossings have a pervasive presence on the rail network, existing wherever trains operate. Thus the establishment and preservation of clear and uniform rules regarding railroad responsibility at crossings is a matter of great importance to the railroad industry. AAR filed two briefs before this Court in *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993), a case involving the preemptive effect of the Federal Railroad Safety Act on railroad duties at crossings arising under state tort law.

Numerous lower court decisions applying *Easterwood* have followed. Because large railroads operate in many states, each such decision typically has impacted multiple AAR members. AAR has, therefore, maintained a continuing interest in this issue, and in the application of this Court's *Easterwood* decision by lower courts. This is evidenced by AAR having filed briefs in a number of cases in both state and federal court where the scope of federal preemption was at issue.[3]

When AAR appears before a court as *amicus curiae* it brings a broad, industry-wide perspective to the issue.

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[2] *E.g., Buckley* v. *Metro-North Commuter R.R.*, 79 F.3d 1337 (2nd Cir. 1996), *cert. granted* Nov. 1, 1996; *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988); *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987).

[3] *See Hughes* v. *CSX Transp., Inc.*, 83 F.3d 420 (5th Cir. 1996); *Hester* v. *CSX Trans., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 815 (1996); *St. Louis Southwestern Ry.* v. *Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1963 (1995); *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994); *Shanklin* v. *Norfolk Southern Ry.*, No. 94-01212 (W.D. Tenn. 1996), appeal pending, 6th Cir., No. 96-6371; *Pearson* v. *Columbus & Greenville Ry.*, 672 So.2d 773 (Miss. App. 1995); *Union Pacific R.R. v. Sharp*, No. 96-1096 (Ark. S. Ct.) (AAR motion for permission to file amicus brief granted, Jan. 21, 1997).

This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole.

In this case, the lower court misread this Court's *Easterwood* decision. This decision will impact a significant portion of the railroad industry, not just the individual railroad involved. In this case, as in others, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 77 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is grade crossing safety and the litigation that frequently ensues as a result of accidents between trains and motor vehicles at grade crossings. As of 1995, there were 163,917 public grade crossings on the nation's rail system.[1] Tragically, accidents at crossings are a daily event. Though crossing safety has improved markedly in the past two decades, there are still about 4000 accidents between trains and motor vehicles at crossings each year, resulting in nearly 2000 injuries and over 500 fatalities.[2]

Commonly, when a train-vehicle accident occurs at a grade crossing, one or more of AAR's members are sued in a state-law tort action. In 1995, crossing accidents resulted in 3,134 claims and 626 lawsuits against railroads; that year about $127 million was paid out by the industry in connection with such claims.[3] Litigation typically involves questions about which party is responsible for various aspects of crossing safety. Allegations, like those made in the cases at bar, that the railroad failed to provide adequate warning devices at the crossing, are almost a given in crossing litigation.

In *CSX Transp., Inc.* v. *Easterwood* 507 U.S. 658 (1993), this Court addressed the question of whether and when the Federal Railroad Safety Act of 1970 (FRSA) and regulations issued by the Secretary of Transportation preempt state law duties with regard to crossing warning devices.[4] The court below, confronted with a seemingly

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[1] Federal Railroad Administration, Highway-Rail Crossing Accident/Incident and Inventory Bulletin, No. 18, Calendar Year 1995, at 64, Table 33 (Sept. 1996). (Accident/Incident Bulletin)

[2] *Id.* at 33, Table 4, for 1995 data.

[3] Association of American Railroads, 1995 Claim & Litigation Report 2-18 (May 1996).

[4] *Easterwood* addressed two laws enacted by Congress to combat the then-growing problem of grade crossing accidents. The first was FRSA. Pub. L. No. 91-548. 84 Stat. 971 (1970) (originally codified as amended at 45 U.S.C. § 421, *et seq.*), reenacted in the

straightforward application of *Easterwood*, chose not to follow this Court's decision and reversed two trial courts which had ruled that plaintiffs' state law claims were preempted. The result is to reimpose duties on railroads (with concomitant liability for breach of those duties) where this Court had previously ruled they do not exist. The serious financial consequences that flow from this decision, and the frequency with which this issue arises in state and federal court, makes this case of utmost interest to AAR and its members.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

SUMMARY OF THE ARGUMENT

In *CSX Transp., Inc.* v. *Easterwood*, this Court held that where federal funds have participated in the installation of a crossing warning device, state law seeking to impose on railroads a duty to select and install devices is preempted. The court below ignored the essence of the *Easterwood* decision, ruling that even though the warning devices at the crossings at issue were federally funded, preemption was not a defense since the accidents occurred during foggy conditions and when the warning devices may have been otherwise obscured. This ruling completely eviscerates *Easterwood*, erroneously treating preemption as an evanescent doctrine that shifts with local conditions. The ruling below threatens dramatically to expand railroad liability for grade crossing accidents and to recreate the state of confusion regarding railroad responsibility at

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Act of July 5, 1994, Pub. L. No. 103-272, § 1(e), 108 Stat. 863 (now codified at sections of 49 U.S.C. § 20101, *et seq.*). FRSA's preemption provision (originally 45 U.S.C. § 434) is now codified at 49 U.S.C. § 20106. The second was the Highway Safety Act, 23 U.S.C. § 101, *et seq.*, and in particular, the 1973 amendment thereto, as codified at 23 U.S.C. § 130(d), the precursor of the federal Grade Crossing Program. The regulations at issue in *Easterwood* were promulgated under FRSA and § 130(d).

crossings that existed prior to this Court's *Easterwood* decision.

ARGUMENT

I. THE MISREADING OF *EASTERWOOD*'S STRAIGHTFORWARD TEST FOR FEDERAL PREEMPTION BY THE COURT BELOW UNDERMINES THE UNIFORM APPROACH TO CROSSING SAFETY ESTABLISHED BY THIS COURT

Prior to ruling in *Easterwood*, a great deal of confusion existed regarding railroad duties at crossings, and the existence and applicability of preemption under FRSA.[5] This Court addressed that issue, examined the various federal regulations relating to crossing safety, and established a rule that focused on the use of federal funds as the preemptive trigger. After analyzing 23 C.F.R. § 646.214(b)(3) and (4), this Court concluded that "for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed", covering "the subject matter of state law which . . . seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." 507 U.S. at 671.[6] Thus, where federal funds have participated in the installation of a crossing warning device, state law seeking to impose on railroads a duty to select

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[5] Prior to this Court's 1993 decision, four federal courts of appeal had taken different approaches to this issue. *Hatfield* v. *Burlington Northern R.R.*, 958 F.2d 320 (10th Cir. 1992); *Easterwood* v. *CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991); *Karl* v. *Burlington Northern R.R.*, 880 F.2d 68 (8th Cir. 1989); *Marshall* v. *Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983).

[6] Sections 646.214(b)(3) and (4) require that automatic gates and flashing lights be installed as part of any improvement project when certain conditions pertaining to the crossing are met, or, when such conditions are not met, that the type of warning device to be installed be subject to the approval of the Federal Highway Administration.

and install devices is preempted pursuant to 45 U.S.C. § 434.[7]

The trial court in the *Lang* case below recognized the impact of *Easterwood*. In granting summary judgment to Petitioner, the court stated that "preemption arises from the exercise of [federal] authority" which is "established by proof of a rather mechanical, but substantively important and complex act, i.e., expenditure of federal funds for the installation of passive warning devices." Pet. Br. at 33a.

Unlike the trial court, however, the Alabama Supreme Court ignored the essence of the *Easterwood* decision.[8] Its holding that even though the warning devices at a crossing were federally funded, preemption was not a defense since the accident occurred during foggy conditions and when the warning devices may have been other-

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[7] *Easterwood* also examined the regulations at 23 C.F.R. pt. 924 (requiring as a condition of receiving federal aid that states establish a highway safety program, to include ranking of crossing hazards) and 23 C.F.R. § 646.214(b)(1) (requiring compliance with the Manual on Uniform Traffic Control Devices), but concluded that they did not cover the subject matter of state law with respect to the selection and installation of warning devices. (To be consistent with Petitioner's brief and the opinion below, AAR shall refer to FRSA's preemptive provision as § 434 even though it has recently been recodified. *See* Pet. Br. at 5, n.3.)

[8] The Alabama Supreme Court relied on this Court's general admonition that preemption will not attach unless it is the clear intent of Congress to preempt state law. However, it failed to appreciate that this Court has already ruled that Congress clearly *did intend* preemption when federal funds participate in the installation of crossing warning devices. Not surprisingly, its holding is at odds with recent decisions of several federal courts of appeal. *See Hester* v. *CSX Transp., Inc.*, 61 F.2d 382 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 815 (1966); *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996); *Elrod* v. *Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1995). *See* Pet. Br. at 12-13.

wise obscured, completely eviscerates *Easterwood*.[9] The ruling suggests the absurd result that state tort claims are preempted on a clear day, but not when the weather changes. Under this rationale, another lower court might find that preemption evaporates if the railroad failed to warn of snowy or rainy conditions.

The notion that the preemptive effect of § 434 can be modified by weather or the alleged condition of a warning device, reduces a direct holding of this Court, as Petitioner notes, to a matter of semantics. These "facts" have no impact on preemption; in fact, crossing conditions like weather and visibility are factors taken into account when the federal authorities approve a particular warning device. This Court was clear that the test of preemption with regard to adequacy of warning device claims is the presence of federal funds. The court below did not dispute that this requirement was satisfied with respect to both cases, yet it reversed the summary judgment orders recognizing preemption.[10] Under this holding, simply by alleging that a railroad failed to warn about a condition or maintain the device, a state law claim, preempted under *Easterwood*, is resuscitated. Preemption is not such an evanescent doctrine.

If the ruling below is allowed to stand railroads will never know when and whether they retain state law duties

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[9] *See Williams* v. *Alabama Great Southern R.R.*, 1994 U.S. Dist. LEXIS 11024 (E.D. La.), rejecting the assertion that the presence of fog may serve to override the preemptive effect of the Secretary's regulations.

[10] The court relied on the rationale in *Michael* v. *Norfolk Southern Ry.*, 74 F.3d 271 (11th Cir. 1996), but did not explain how the rational in *Michael* was applicable to the cases at bar. In *Michael*, the Eleventh Circuit held that preemption was not a defense where there was evidence that the railroad failed to install devices which conformed to the specifications approved by FHWA. Assuming *arguendo* that *Michael* is correct, it is nonethless distinguishable: in the cases at bar, there were no allegations of failure to comply with federal specifications.

regarding the adequacy of warning devices. The legal landscape will more closely resemble the days prior to *Easterwood* when the responsibilities of various parties for crossing safety were vaguely defined. A return to confusion and lack of uniformity will not just impact the railroads, it is inconsistent with the goals of the federal Grade Crossing Program.[11] This Program, which requires states to identify hazardous crossings and prioritize upgrade projects, rests on the notion that responsibilities at grade crossings should be clearly established.[12]

The decision below, by itself, will have wide-ranging effects in Alabama alone. Twenty one railroads operate over 3300 miles of track containing 3610 crossings in the state of Alabama.[13] Crossing accidents are, unfortunately, not uncommon. In 1995, there were 164 crossing accidents between trains and motor vehicles at those crossings.[14] The state supreme court has given litigants in Alabama carte blanche to plead around *Easterwood* by alleging that the railroad has failed to warn about a hazard or to maintain a warning device, notwithstanding that

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[11] 23 U.S.C. § 130(d). *See* Pet. Br. at 4-6.

[12] Section 130(d) required, for the first time, that states be responsible for surveying to identify problem crossings and implementing improvement projects. This was in response to a FRSA-mandated USDOT Report (Railroad-Highway Safety Part II: Recommendations for Resolving the Problem. (August 1972)), which criticized the outmoded state-law concept of dividing responsibility between railroads and state agencies as having resulted in a fragmented approach toward safety. The Report focused on the anomaly involved in the traditional state-law imposition of joint responsibility at grade crossings. *Id.* at 33.

[13] Association of American Railroads, Railroads and States 18 (data on railroads and trackage) (1995 data is from AAR database supporting this publication, but not yet in published form); Accident/Incident Bulletin at 72, Table 45 (data on number of crossings).

[14] Accident/Incident Bulletin at 33, Table 4.

the devices at the crossing were installed with federal funds.

Of course, as a rule of law, the decision of the Alabama Supreme Court threatens dramatically to expand railroad liability for grade crossing accidents beyond anything this Court approved in *Easterwood*. In sum, the Court should grant review of the decision below in order to ensure that the rule in *Easterwood* is not relegated to a mere pleading requirement that provides no meaningful guidance to federal regulators, railroads and state highway officials concerning their respective responsibilities in promoting safety at railroad crossings.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Supreme Court of the State of Alabama in this case be granted.

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No. 96-1332

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NORFOLK SOUTHERN RAILWAY COMPANY
and DANNY STEVE GARNER,
Petitioners,

v.

BRUCE LANG, PEGGY LANG and DOUGLAS K. HAMLIN,
conservator of the estate of Cinda S. Karjala,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Norfolk Southern Railway Company's petition for certiorari demonstrated that the Alabama Supreme Court's decision narrowly construing this Court's decision in *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993), was both inconsistent with the plain language of this Court's decision and with at least three federal circuit court opinions. Respondents argue in opposition that *Easterwood* should be given an extraordinarily crabbed interpretation based on general pre-emption principles and that the opinions of the courts of appeals reading *Easterwood* more expansively can be distinguished. Neither argument withstands scrutiny. At the end of the day, there is a real conflict between the federal circuits and the Alabama Supreme Court that warrants this Court's review and this case presents an excellent vehicle for developing further the con-

tours of the Court's decision in *Easterwood* and thereby providing needed guidance to the lower courts on issues that recur frequently.

1. Respondents begin their response with an extended discussion of familiar principles of pre-emption law, *viz.*, pre-emption is disfavored and there is a presumption against pre-empting state law (Opp. 7-9). But this analysis is completely irrelevant to the question whether respondents' specific claims are pre-empted under this Court's interpretation of 45 U.S.C. § 434 in *Easterwood*.

Those principles already informed the Court's decision in 1993 not to adopt broader pre-emption theories. They provide no basis for cutting back on the Court's express holding that federal funding is the touchstone of pre-emption because under the Secretary of Transportation's regulations, funding necessarily embodies federal approval of the particular devices installed at a particular crossing. *Easterwood*, 507 U.S. at 671 ("for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed"). The approval and expenditure of federal funds for the particular project thus constitutes a "standard covering the subject matter of such State requirement . . ." that pre-empts state law. 45 U.S.C. § 434; *Easterwood*, 507 U.S. at 664.

With respect to the precise limits of pre-emption, the Court answered that question in *Easterwood* as well—any state law, including tort law, which "seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings" is pre-empted. 507 U.S. at 671. Thus, contrary to respondents' hyperbole (Opp. 12), petitioner does not seek complete immunity for tort actions arising out of crossing accidents.[1] Instead, it seeks merely

[1] Section 434 and 23 C.F.R. § 646.214(b)(4) operate in tandem to preempt all state law claims seeking recovery in connection with the adequacy of the signals that the federal government has approved and funded. Thus, if a railroad breaches a different duty,

what the statute provides in light of *Easterwood*, elimination of a state tort duty to identify or repair dangerous crossings.

This is precisely the duty the Alabama Supreme Court imposed upon petitioner. The railroad now must identify "unduly hazardous" crossings (Opp. 6) and assume a duty to "warn" motor vehicle traffic about those hazards and it must identify crossings with poorly maintained safety devices and "repair" them. The decision below thus reduced this Court's treatment of the duty to "identify and/or repair" into a mere pleading requirement, permitting plaintiffs to assert that state tort law duties to "warn" and "maintain" are not pre-empted. This reading is certainly at odds with the language of the Court's opinion and the Court should grant the petition to clarify its prior holding.

2. Given the clarity of the Court's holdings that federal funding triggers pre-emption and that the duty to "identify and/or repair" is pre-empted, the courts of appeals have uniformly and routinely found pre-emption whenever there is uncontested proof, as there is here, that federal funds were employed in installing safety devices at a crossing. See, *e.g.*, *Armijo* v. *Atchison, T. & S. Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996); *Elrod* v. *Burlington N.R.R.*, 68 F.3d 241 (8th Cir. 1995); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996). Respondents' attempts to distinguish these cases are completely unavailing.

With respect to *Armijo*, respondents simply assert (Opp. 16) that it was wrongly decided because it ignored "the presumption against pre-emption." Even if the suggestion had merit, which it does not because the holding is completely faithful to *Easterwood*, the argument reveals plainly that there is a square conflict between the holding

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such as a failure to sound a horn or to maintain a proper lookout, which causes an accident at a grade crossing, then there is no pre-emption. There are myriad similar duties that are unaffected by petitioner's preemption argument. *See* Opp. 16-17 (identifying non-preempted claims in the case law).

in *Armijo* that a state law claim of "failure to warn" of hazardous conditions is pre-empted because of federal funding (87 F.3d at 1189) and the holding below that precisely that same state law duty is not pre-empted. This conflict is more than enough to justify certiorari.

Respondents attempt to distinguish the other cases on the basis that this case involves a failure properly to apply 23 C.F.R. § 646.214(b)(3), which establishes criteria for installing active warning signals, as opposed to the passive signals funded in this case. Of course, there is not one word in the supreme court's opinion below that remotely embraces this argument. Moreover, there is no basis for concluding that the Secretary of Transportation erred in deciding that these crossings did not require automatic gates when he approved funding for installing passive safety warnings.

Incredibly, respondents take the argument even further and attempt to convert the clear legal holding below into a failure of proof case by suggesting that petitioner "failed to prove that any diagnostic team had made [a § 646.214 (b)(3)(i)] determination for either of the crossings involved in the present cases." Opp. 14. Even this contrivance does not distinguish the federal circuit cases. In *Hester* the court of appeals explicitly noted that "there is no record evidence indicating that such a diagnostic team made any recommendations with respect to Hatley Circle." 61 F.3d at 386 n.6. That failure of proof was not fatal in *Hester* because, as in this case, there was "an actual, authorized expenditure of federal funds . . . to trigger pre-emption." *Id.*[2] Thus, the precise argument now offered

[2] Although the court in *Elrod* did off-handedly note that none of the conditions that would trigger use of automatic gates was "present at that particular crossing," 68 F.3d at 243 n.5, the opinion in no way indicated that this fact was at all relevant to the pre-emption analysis. Instead, the court focused exclusively on " '[t]he fact that federal funds participated,' " which " '*legally* presupposes that the Secretary determined that the safety devices installed

by respondents was specifically identified as irrelevant in *Hester*. The conflict between the decision below and *Hester* simply cannot be made to disappear with this sleight of hand.

Finally, respondents point out that "in all three cases relied upon by the petitioner, the courts expressly noted that there were negligence claims against the rail carriers that were not pre-empted. . . ." Opp. 16. This observation is true, but how respondents regard it as relevant is baffling. First, this argument completely undermines respondents' assertion (Opp. 12-13) that fidelity to *Easterwood*, as these courts have interpreted it, will "immunize" railroads from all claims arising out of grade crossing collisions. See note 1, *supra*.

Second, the additional observation that "respondents *raised* claims . . . unrelated to any claim of inadequate warning signs" does nothing to help them in this Court. Opp. 17 (emphasis added). The operative language is "raised," in the past tense. Only the Langs ever raised any question concerning vegetation control in the trial court and they expressly abandoned all non-signal-related claims at the hearing on summary judgment. See Pet. App. 34a ("stipulation of the plaintiffs" to dismiss all claims "save and except the sole claim with respect to the adequacy of the signs" "with prejudice"). In light of this stipulation, respondents, not surprisingly, did not present any question on appeal to the Alabama Supreme Court concerning pre-emption of negligence with respect to any non-signal-related claims.[3] Thus, the absence of non-pre-empted tort claims is strictly a function of respondents' litigating

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were adequate to the task.' " *Id.* at 244 (emphasis added), quoting *Hester*, 61 F.3d at 387. That same "legal presupposition" applies here and accordingly preemption should follow as well.

[3] *See* Brief of Appellants, *Lang* v. *Norfolk Southern Railway Company*, Case No. 1931292 (filed Sept. 19, 1994) at 10 (questions presented limited to "the adequacy of the warning devices at the Pace Street Crossing").

strategy and in no way diminishes the worthiness of this case for certiorari. Indeed, the case is a particularly good vehicle for resolving the question presented because it presents a single, clean issue for resolution that promises to end this litigation once and for all.

* * * *

This case warrants review for precisely the same reasons that review was appropriate in *Easterwood*. In both cases the appellate court reopened litigation by taking a restrictive view of the pre-emptive effect of 45 U.S.C. § 434, and in so doing adopted an interpretation that conflicted with decisions of other courts of appeals. As both the petition (at 14 n.10) and the *amicus* brief for the Association of American Railroads (at 7) amply demonstrate, these are issues that recur just as frequently today as they did in 1993. If anything, the frequency of appellate decisions on the issue has increased in the wake of *Easterwood*. Pet. 14. Respondents do not even attempt to argue that the question posed by petitioner is not a recurring or a fundamental issue under the Federal Railway Safety Act. Nor could they.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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